Krist Oil Co., Inc. ***and*** **Yvonne Mains and Jodi Creten, Richard Johnson, and Donald Maglio.** Cases 30–CA–12137, 30–CA–12370–1, 30–CA–12476, and 30–CA–12535

June 28, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On November 16, 1994, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and supporting arguments, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified herein and to adopt the judge's recommended Order as modified.

1. In the final paragraph of section II,C,2 of his decision, the judge found that the Respondent's retraction of its unlawful *warning* to Donald Maglio did not also include a retraction of its unlawful *reprimand* of Maglio. Both the unlawful warning and reprimand were, however, jointly memorialized by the Respondent in an April 21, 1994[2] document styled "EMPLOYEE CONFERENCE RECORD[;] LETTER OF REPRIMAND." In an April 26 "EMPLOYEE CONFERENCE RECORD," the Respondent stated that the April 21 *warning* had been rescinded, and had been removed from Maglio's personnel file. In his testimony, Maglio characterized the April 26 document as "the letter of apologies . . . [t]hey took it all out of my record and everything."

We find that the Respondent's April 26 statement of rescission and removal of the April 21 warning can reasonably be construed to include both the April 21 warning *and* the reprimand. To ensure, however, that the Respondent has actually taken the actions described in its April 26 statement, and to fully remedy the violation as discussed by the judge, we shall retain the aspect of the judge's recommended Order pertaining to the removal of these documents from its files.

2. The judge found, and we affirm, that the Respondent unlawfully discharged Yvonne Mains and Jodi Creten in May 1993, and Richard Johnson and Brian Koski in July 1993, all in violation of Section 8(a)(1) of the Act, but not in violation of Section 8(a)(4).

The judge further found, and we affirm, that the Respondent violated Section 8(a)(1) and (4) by ultimately reinstating Mains on May 4 as a trainee, assigning her to perform onerous and excessive work, subjecting her to surveillance by permitting her to work only in accordance with her supervisor's schedule, and refusing to permit her to work at all on May 6, because of her supervisor's absence from work on that day, thus causing her to lose a day's pay.

The judge also found that the Respondent's unlawful mistreatment of Mains following her reinstatement on May 4 clearly establishes that its *offers* of reinstatement to Mains in April and on May 3 were not made in good faith, and that they did not toll the Respondent's reinstatement obligation and backpay liability stemming from her May 1993 unlawful discharge. We affirm these findings.[3]

3. The judge also found that the Respondent's offers of reinstatement to Creten, Johnson, and Koski in April and May were not made in good faith and did not toll the Respondent's reinstatement obligation and backpay liability to them. For the reasons discussed below, we disagree with the judge in this regard.

a. Background

Prior to their unlawful discharges in May 1993, Yvonne Mains and Jodi Creten worked as cashiers at the Respondent's combination gasoline station-convenience store in Escanaba, Michigan. Prior to their unlawful discharges in July 1993, Richard Johnson and Brian Koski worked as tank truckdriverss out of the Respondent's Iron River, Michigan, headquarters, about 70 miles from Escanaba. The drivers' principal function was to deliver fuel to the Respondent's 39 combination gasoline station-convenience stores on Michigan's Upper Peninsula and in Wisconsin.

b. Facts

(1) Jodi Creten

On April 15, the Respondent notified Creten in writing that "[e]ffective immediately, you are hereby unconditionally reinstated to your former work position," that the Respondent preferred that she return to work not later than April 25, that she could return sooner if she wished, and that if she did not intend to return, the Respondent would appreciate immediate notification. Creten did not respond to this letter.

[1] The only exceptions to the judge's unfair labor practice findings are to his findings (1) that the Respondent unlawfully mistreated discriminatee Yvonne Mains in violation of Sec. 8(a)(1) and (4) of the Act following her May 4, 1994 reinstatement to employment with the Respondent (as described by the judge in the final five paragraphs of sec. II,A,1 of his decision, and discussed in sec. II,A,2; and (2) that the Respondent retaliatorily promulgated new workplace rules in May 1994, in violation of Sec. 8(a)(1) of the Act (as described and discussed by the judge in sec. II,D of his decision). We adopt these unfair labor practice findings.

The Respondent has also excepted to the judge's conclusion that its offers of reinstatement to unlawfully discharged employees Mains, Jodi Creten, Richard Johnson, and Brian Koski were not made in good faith and were thus invalid. These matters are discussed infra.

[2] All subsequent dates are 1994, unless otherwise stated.

[3] The Respondent has submitted to the Board a copy of a "Settlement, Release, and Hold Harmless Agreement" between it and Charging Party Yvonne Mains. Although this agreement may raise issues relevant to the compliance stage of this proceeding, it does not affect our resolution of any of the unfair labor practice issues.

On May 3, the Respondent's Human Resources Director, Ric Smetak, sent Creten another offer of reinstatement, noting that the Respondent had not received a reply to its April 15 offer, and advising her that counsel for the General Counsel, Rocky L. Coe, had subsequently told the Respondent that Creten was (according to the Respondent's May 3 letter) "not able to accept reinstatement without assurances." The letter continued as follows:

> Krist Oil Company reiterates its offers of unconditional reinstatement. Let me assure you that this is an *unconditional* offer to return to work. You will not be discriminated against in any way in violation of state or federal law. There will be no retaliation against you with regard to your ongoing litigation with the NLRB. Krist Oil's supervisory staff recognizes their responsibilities and your rights under the National Labor Relations Act and intend[s] to completely abide by those responsibilities and rights. Any suggestion to the contrary is inappropriate. [Emphasis in original].

The letter requested that Creten return to work on Monday, May 9, to work the 11 p.m.—7 a.m. shift, and told her that she would normally be scheduled to work 3 days per week (i.e., essentially the same schedule that she had worked prior to her discharge); that she had been scheduled to work May 9, 10, and 11; and that her conditions of employment and responsibilities were unchanged. The letter stated that the Respondent needed to hear back from Creten "as soon as possible . . . in writing by no later than May 6th at noon regarding your position on these requests to work." Creten did not respond to this letter.

Creten testified that she made "no response whatsoever" to either of the above letters. While she testified that she did not believe the Respondent's promises, contained in the May 3 letter, that it would not retaliate against her and that it would observe the law and her rights, she did not testify that that was the reason why she did not respond to the reinstatement offers. She offered no explanation for not responding to the offers. She testified that, except for the two reinstatement letters, she had not had any contact with any Respondent supervisory or management officials since her discharge in May 1993.

(2) Richard Johnson

Johnson testified that around February the Respondent's president, Krist Atanasoff (Krist) suggested that Johnson consider coming back to work for the Respondent, and that he and Krist discussed it. Around late February, Johnson met with Krist, General Manager Donn Atanasoff (Donn), and Fleet Supervisor Ed Jardanowski. They offered to reemploy him, but Johnson did not act on the offer. Johnson had a subsequent telephone conversation with Donn, in which they discussed Johnson's seniority if he accepted the offer of reemployment.

On March 11, the Respondent sent Johnson a letter, in which it summarized the above meetings and conversations. It asserted that the Respondent had offered Johnson reinstatement to his previous position as truckdrivers, at full pay and benefits, and that Johnson had told the Respondent that he wanted to be assigned to a newly purchased truck, he was not willing to drive in the afternoon or evening (second shift), and he did not want to work on weekends or on overnight trips. The letter said:

> [I]t appears to us that you are using your NLRB claim or the proposed withdrawal of it as leverage to obtain special treatment and privileges . . . . Please be advised that Krist Oil feels that it has made you a very attractive offer of reinstatement, but based upon our conversation of yesterday, you are declining this offer.

Johnson did not respond to this letter. On April 15, the Respondent notified Johnson in writing that it was offering him "unconditional reinstatement to your former work position" with the Respondent, that the Respondent preferred that he return to work not later than April 25, that he could return sooner if he wished, and that if he did not intend to return, the Respondent would appreciate immediate notification.

Johnson spoke to Donn about this letter, clarifying to him where Johnson thought his position should be if he went back to work. Johnson did not, however, agree to return to work, because, according to his testimony, there were "no guarantees of what I was going to get." Johnson sought guarantees about seniority and also that there "would not be—anything against me for all the proceedings that happened before this." He also told the Respondent that if he accepted the reinstatement offer, he would have to give his current employer a couple of weeks notice. Johnson neither accepted nor rejected this April 15 offer of reinstatement.

On May 3, the Respondent sent Johnson another letter, asserting that Johnson had been offered unconditional reinstatement several times (February 13, February 21, March 8), and that Johnson had imposed additional demands, such as a new truck, to which the Respondent had agreed, but that Johnson had nevertheless not returned to work. The letter then referred to the fact that Johnson had again been offered reinstatement on April 15, and asserted that he had agreed to return to work on April 25, but that he had failed to report for work as scheduled on that date, without notifying the Respondent in advance or thereafter. The letter continued in pertinent part with the same language as contained in the May 3 letter to Creten, excerpted in section 3,b,(1) above. The letter requested that Johnson return to work on Monday, May 9, at 7:00 a.m., and told him that upon arrival he would receive daily driving assignments, and that his conditions of employment and job responsibilities would be unchanged.

The letter said that the Respondent needed to hear back from Johnson "as soon as possible . . . in writing by no later than May 6 at noon regarding your position on these requests to work." Johnson did not respond to this letter.

Johnson testified that he did not accept any offer of reinstatement because:

> I didn't feel that there was any guarantee whatsoever that I wouldn't be harassed or anything after I went back to work, and I felt that I could not trust what they were telling me.

Johnson also testified that he would have had to give up his current job in order to accept the Respondent's offer of reinstatement.

(3) Brian Koski

Koski did not testify about being offered reinstatement. According to Krist, around October 1993 he had a casual conversation with Koski, asking Koski to come back to work because the Respondent needed drivers, and telling him that if he ever wanted to come back to work for the company, Krist could "let bygones be bygones." Koski did not respond to this offer.

On April 15, the Respondent notified Koski in writing that "[e]ffective immediately, you are hereby unconditionally reinstated to your former work position" with the Respondent, that the Respondent preferred that he return to work not later than April 25, that he could return sooner if he wished, and that if he did not intend to return, the Respondent would appreciate immediate notification. Koski did not respond to this letter.

On May 3, the Respondent sent Koski another letter, asserting that the Respondent had offered him unconditional reinstatement on October 16, 1993, which Koski had assertedly refused, and that he had again been offered reinstatement on April 15. The letter also contained the same language that was in the May 3 letter to Creten, excerpted in section 3,b,(1) above. The letter requested that Koski return to work on Monday, May 9, at 7 a.m., and stated that upon arrival he would receive daily driving assignments and that his conditions of employment and job responsibilities would be unchanged, and that the Respondent needed to hear back from Koski "as soon as possible . . . in writing by no later than May 6th at noon regarding your position on these requests to return to work." Koski did not respond to this letter.

c. Analysis and conclusions

It is wellestablished that an employer that has unlawfully discharged an employee may satisfy its obligation to reinstate the employee and may toll its backpay liability by offering reinstatement, provided that the offer is firm, clear, specific, and unconditional.[4] A facially valid offer of reinstatement will be found invalid (and thus will not satisfy the employer's reinstatement obligation or toll its backpay liability) where—as with Mains in this case—following the employee's acceptance of the offer, the employer imposes undue, onerous, or unlawful conditions of employment on the reinstated employee.[5] On the other hand, even where, as here, an employer has imposed invalidating conditions on *some* reinstated employees, if there is no indication that *other* employees who were offered reinstatement were aware of the circumstances that invalidated the reinstatement offers to their fellow employees, then the employer's otherwise facially valid offers of reinstatement to these other employees will not be invalidated, and the employer's reinstatement obligation and backpay liability to these other employees offered reinstatement will be satisfied and tolled, respectively.[6] Further, an unlawfully discharged employee is privileged to reject an offer of reinstatement, and preserve his ongoing entitlement to reinstatement and backpay, where he has a reasonable fear of further discrimination against him.[7] In addition, when a discriminatee receives a letter that unconditionally offers reinstatement and that also states a report-back date, the offer will not be invalidated simply because the specified reporting date appears unreasonably short, as long as the offer does not make it clear that reinstatement is dependent on the employee's return by the specified date, or suggest that the offer will lapse if a decision on reinstatement is not made by that date.[8] A failure to respond within a reasonable time to a reinstatement offer that is valid under the above rules will toll the running of backpay.[9]

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[4] See, e.g., *Sunol Valley Golf Club*, 310 NLRB 357, 375 (1993), enfd. sub nom. *Ivaldi v. NLRB*, 48 F.3d 444 (9th Cir. 1995); *Consolidated Freightways*, 290 NLRB 771 (1988), enfd. as modified 892 F.2d 1052 (D.C. Cir. 1989), and cases cited therein *Flatiron Materials Co*., 250 NLRB 554, 561 (1980).

[5] See *Eastern Die Co*., 142 NLRB 601 (1963) (Arel, Gagnon, Fortier, and Polley), enfd. 340 F.2d 607 (1st Cir. 1965); *Research Designing Service*, 141 NLRB 211, 216–217 (1963).

[6] *Florida Steel Corp.,* 273 NLRB 889, 917 (1984) *(*Ashcraft and Theodore); *Eastern Die Co*., 142 NLRB 601, 604 (1963) (Cyr); *Research Designing Service, Inc.*, supra (Aszurek and Szawronski).

In *Consolidated Freightways*, 290 NLRB 771 (1988), enfd. as modified 892 F.2d 1052 (D.C. Cir. 1989), the Board held generally that a discriminatee must respond to a facially valid offer of reinstatement, and that if he does not, then, to avoid having his backpay tolled, he must show that any refusal to accept such a facially valid offer of reinstatement is based on invalidating conditions *of which he was aware* ("that came to his attention"). 290 NLRB at 773. Similarly, in *Manhattan Graphic Productions*, 282 NLRB 277, 285 (1986), the Board affirmed the judge's finding that the employer's offer of reinstatement to a discriminatee "would likely have been invalidated by the probable failure" of the employer to pay him the proper salary. "Nevertheless," found the Board, "as this did not occur because [the discriminatee] did not return to work, this speculative event can not serve to invalidate the offer of reinstatement" (citing *Florida Steel*, *Eastern Die* and *Research Designing*, supra).

[7] *Domsey Trading Corp*., 310 NLRB 777, 777–778 fn.3, 800 (1993), enfd. 16 F.3d 317 (2d Cir. 1994); see *Woodline Motor Freight*, 278 NLRB 1141 (1986), enfd. in pertinent part 843 F.2d 285 (8th Cir. 1988).

[8] *Esterline Electronics Corp*., 290 NLRB 834, 835 (1988).

[9] Id.

(1) Jodi Creten

The judge did not find that the Respondent's reinstatement offers to Creten were not firm, clear, specific, and unconditional, or that they were not otherwise facially valid. Nevertheless, in section II,A,2 of his decision, he found that the Respondent's reinstatement offers to Creten were not made in good faith.

Applying the legal principles set out above to the particular circumstances surrounding the Respondent's April 15 offer of reinstatement to Creten, we find, contrary to our dissenting colleague, that the Respondent's offer of reinstatement was not invalidated by the Respondent's subsequent unlawful activity.

The judge relied on two essential factors in finding that the Respondent's offer of reinstatement to Creten was invalid. First, the judge found it "likely" that if Creten had accepted the reinstatement offer, the Respondent would have inflicted the same treatment on her that it did on Mains. The judge further found, in this same vein, that the Respondent's mistreatment of Mains upon reinstatement "suggested" that it would similarly mistreat Creten if she too accepted reinstatement. The judge based these findings on the fact that Mains and Creten had been discharged at the same time for their mutual protected activities a year earlier, in May 1993, and also that they were both charging parties in June 1993 in one of the cases that has been consolidated in this proceeding.

But, as seen, there is no showing that the outcome that the judge found likely to occur was suggested to Creten herself. Although she expressed her disbelief of the Respondent's promises not to retaliate against her or treat her unlawfully, such subjective disbelief of assurances on Creten's part, without more, will not invalidate the Respondent's otherwise valid offer of reinstatement. Here, Creten simply gave no reason for not responding to either of the Respondent's offers of reinstatement. Indeed, as in the cases cited above, there is no indication that Creten was aware of the Respondent's unlawful treatment of Mains during the early-May time of this dual series of events—i.e., Mains' first few days back at work following her May 4 return, and Creten's simultaneous receipt of the Respondent's May 3 second offer of reinstatement. Thus, there is no basis in the record for a finding that *Creten* found it likely that she would be subject to the same mistreatment as Mains if she accepted the offer of reinstatement, and no basis for a finding that she failed to accept the reinstatement offer for that reason in particular, or for such a reason in general, or for any reason at all.[10]

Second, the judge found that the Respondent's offers of reinstatement to Creten were invalid and in bad faith because they must also be viewed in the light of the Respondent's persistence in violating the Act in April and May, i.e., (1) by issuing a written reprimand and warning to Iron City driver Donald Maglio, and withholding an hour's pay from him, on April 21, in violation of Section 8(a)(1) and (4); (2) by retaliatorily promulgating new rules on May 9 against solicitation, distribution, and false, defamatory, or derogatory statements about the company, its managers, employees, or customers, in violation of Section 8(a)(1); and (3) by retaliatorily promulgating on May 14 new rules restricting the Iron City truckdriverss' use of CB radios, also in violation of Section 8(a)(1).

Although the judge found that the above additional violations added to what he considered to be the already considerable risk confronting Creten, there is no indication that she was aware of them in failing to accept the Respondent's reinstatement offers. See cases cited in fn. 6, supra. Thus, the judge's general reliance on *Woodline Motor Freight*, supra, is unavailing in this context. In that case the employees in question who did not accept offers of reinstatement were found to have had a reasonable fear that they would be subject to further discrimination upon reinstatement, based on the facts that (1) the employer continued to engage in discrimination against union adherents both before and after offering reinstatement to one of the three employees in question; (2) other reinstated employees were subsequently subject to further discrimination; and (3) the other two employees in question were offered reinstatement *on the same day* or 6 days after (respectively) the employer discriminatorily *discharged* the most senior employee, who was a leading union supporter and charter member of the union's in-plant organizing committee, and was also a witness for the General Counsel in a contemporaneous unfair labor practice proceeding against the employer during what turned out to be the last few weeks of his employment, and thus just a few weeks before the two employees in question were offered reinstatement. The Board in that case found that the three discriminatees in question had a reasonable fear that they would not be fully reinstated, but would instead be subject to further discrimination. The judge found, and the Board agreed, that in view of the entire record and, particularly the recent continuation of the discriminatory discharge action against employee Hogan, the employees could reasonably evaluate the offers of reinstatement as not valid. We conclude that the judge in *Woodline* found that the employees were aware of Hogan's discharge. Thus, the judge states "weighing the effect of the recent continuation of discriminatory conduct against Hogan . . . the possibility of reoccurrence of such discriminatory conduct could well be viewed by

[10] Cf. *Domsey Trading Corp*., supra, 310 NLRB at 778 fn. 3 (former strikers had legitimate reasons for declining facially valid offers of reinstatement where record clearly disclosed that they knew from conversations with previously recalled strikers that employer was physically and verbally abusing returning strikers).

the affected employees as *real*."[11] The discriminatees could not have been in position to evaluate Hogan's discharge if they did not know that the discharge had taken place. Since the evaluation in *Woodline* was based on the affected employees' knowledge of the nature of the employer's conduct, there is little similarity between the facts in that case and in this one.

Thus, we find that the Respondent's offer of reinstatement was not invalidated by the Respondent's subsequent unlawful activity, which has not been shown to have been known to Creten at the time in question.

In finding the offer of reinstatement to Creten to be invalid, in section II,A,2 of his decision, the judge cites *Brenal Electric*, 271 NLRB 1557 (1984), for the proposition that, in order to be valid, an offer of reinstatement to a discharged employee must be firm, clear, unconditional, and "made in good faith." While the Board in that case preliminarily said that it found merit in the General Counsel's claim that the employer had failed to carry its burden of demonstrating a "good-faith effort *to communicate* an offer of reinstatement to the employees [emphasis added]," the Board did not in the final analysis elaborate on, explain, or apparently even rely on this statement in finding the offer of reinstatement to be invalid. Rather, the Board ultimately and dispositively found that the offer of reinstatement was invalid because it was not specific, unequivocal, and unconditional; it did not provide sufficient time for the employees to respond; and, under the circumstances, it finally amounted to nothing more, in effect, than an offer for a temporary job apparently conditioned on the employees renouncing the union. The judge in the case at bar, however, has made no such findings about the Respondent's various offers of reinstatement.

We similarly find the dissent's reliance on *Ertel Mfg. Corp*., 147 NLRB 312 (1964), enfd. 352 F.2d 916 (7th Cir. 1965), and *Exeter Coal Co*., 154 NLRB 1678 (1965), to be unpersuasive. In *Ertel*, the employer offered reinstatement to 20 discriminatees when in fact only four jobs were available, and thereafter unsuccessfully attempted to persuade the Board to toll backpay and relieve the employer of the obligation to reinstate the discriminatees who failed to respond to the offers of reinstatement to nonexistent positions. In *Exeter*, the employer discriminatorily delayed the recall from layoff of two of the employees in question, and discriminatorily failed even to offer recall to the third one. Thus, the facts in the case at bar are clearly distinguishable from those in *Ertel* and *Exeter*.[12]

(2) Richard Johnson and Brian Koski

As he found in regard to Creten, the judge likewise found that the Respondent's offers of reinstatement to Johnson and Koski were also not made in good faith, and were thus invalid. Again applying the principles set out above, we disagree with the judge and our dissenting colleague.

As with Creten, the judge did not find that the Respondent's reinstatement offers to Johnson and Koski were not firm, clear, specific, and unconditional, or that they were not otherwise facially valid. In finding, rather, that the offers, including the last ones, on May 3, were not made in good faith, the judge considered (1) the Respondent's unlawful treatment of Mains in early May, in Escanaba; (2) the unlawful written reprimand, warning, and withholding of an hour's pay from Iron City driver Donald Maglio on April 21; and (3) the unlawful retaliatory promulgation of new rules (a) on May 9, against solicitation, distribution, and false, defamatory or derogatory statements about the Company, its managers, employees, or customers, and (b) on May 14, restricting the truckdrivers' use of CB radios. In sum, the judge found that in light of the Respondent's continuing disregard of the Act and its harsh treatment of Mains, it was "likely" that Johnson and Koski would have encountered equally harsh treatment had they accepted the Respondent's offers of reinstatement, and that it was thus unnecessary for them to respond to the offers.

But as with Creten, so too with Johnson and Koski, there is no indication that, in failing to accept the Respondent's reinstatement offers, either of them was aware of the April 22 violations against fellow truckdrivers Maglio when the Respondent made its offers of reinstatement to them, or that either of them became aware of the subsequent violations against Mains following her May 4 reinstatement at Escanaba or the unlawful promulgation of new rules. Johnson testified that while he has never personally met Mains, he has spoken with her by telephone about "things that had happened to each of us . . . [a]s far as *termination*" [emphasis added]. Johnson did not say *when* he spoke with Mains, or whether he had more than one such conversation with her. Mains did not testify about any such conversations. Based on the subject matter as described by Johnson, his conversation with Mains could have taken place *prior to* Mains' May 4 reinstatement, and thus prior to the Respondent's postreinstatement mistreatment of Mains. In any event, regardless of when the conversation took place, Johnson's uncontroverted account of it contains no reference to the Respondent's postreinstatement mistreatment of Mains.

[11] 278 NLRB at 1253 (emphasis in original).

[12] We find our dissenting colleague's reliance on *Red Rock*, 84 NLRB 521, 529 (1949), enfd. as modified 187 F.2d 76 (5th Cir. 1951), cert. denied 341 U.S. 950 (1951), to be equally unavailing. In *Red Rock*, the employer's arguable offers of reinstatement to the discriminatorily discharged employees (telling them to come back within 20–30 days if they had not gotten jobs elsewhere) were made concurrently with the unlawful discharges. The facts in the instant case pertaining to the offers of reinstatement to Creten, Johnson**,** and Koski contain no such manifestations of bad faith.

Thus, we find that the Respondent's offers were not invalidated by the Respondent's subsequent unlawful activity, none of which has been shown to have been known to Johnson and Koski, and, therefore, none of which has been shown to have had an effect on their failure to respond to the Respondent's offers of reinstatement. See cases cited in footnote 6, supra. Here again, general reliance on *Woodline Motor Freight*, supra, is unavailing in this context, for the reasons discussed above. In sum, we do not see how the three employees could have a reasonable fear that reinstatement would be followed by unlawful conduct directed to them, in circumstances where the asserted basis for that fear, i.e., unlawful conduct directed to others, was not even known by the three employees.

d. Summary

We find that the failure of Creten, Johnson, and Koski to respond to the Respondent's offers of reinstatement served to toll Respondent's remedial make-whole obligations to them as of a reasonable time after the offers.[13]

In determining what constitutes such a "reasonable time" under the circumstances of this case, we note that the April 15 offers asked the employees to return by April 25, i.e., within 10 days. We conclude that 10 days was a reasonable amount of time in which the discriminatees could return to work following the Respondent's offer of reinstatement. Consequently, we find that the Respondent's backpay liability to Creten, Johnson, and Koski is tolled effective April 25, i.e., 10 days after the April 15 valid offers of reinstatement.[14]

Our dissenting colleague takes the position that the Respondent's offers were not in good faith and could therefore be ignored. And, in finding a lack of good faith, our colleague relies on the Respondent's unlawful conduct subsequent to the offers of reinstatement. Under our colleague's view, it makes no difference whether the employees knew of the unlawful conduct, whether the employees reasonably feared that similar conduct would befall them, or whether the employees expressed any such fear as the basis for not accepting the offers. Our colleague is forced to this position because each of these matters cuts in favor of the Respondent. That is, (1) there is no showing that the employees were aware of the Respondent's unlawful conduct; (2) the employees could not reasonably fear that similar misconduct would befall them; and (3) none of these employees told the Respondent that any such fear was the basis for not accepting the offers.

Thus, our colleague is virtually forced to take the position that an offer is in bad faith (and thus can be ignored) simply because it is followed by unlawful conduct. Thus, our dissenting colleague would use *subsequent* unlawful conduct to taint a *prior* offer of reinstatement. This is clearly different from using prior unlawful conduct to taint a subsequent withdrawal of recognition. It is also different from using away-from-the-table misconduct to taint contemporaneous bargaining. Our colleague sets no definitive time limit on this principle. Thus, unlawful conduct, even months and years later, can taint the offer and lead to mounting backpay for an employee who has ignored the offer.[15] More importantly, our colleague's position ignores the principle of "work now, grieve later." That is, the accepted industrial norm is that if an employee is working, and there is a claim of employer misconduct directed at her, the employee should continue to work, make the claim, and subsequently receive a remedy for any proven misconduct. A fortiori, if an employee is offered work, *and simply suspects that misconduct to her may occur*, it is clear that the employee should accept the offer, make the claim if misconduct allegedly occurs, and receive a remedy for any proven misconduct. In sum, the employee should accept the offer of reinstatement, and leave to Board processes the remedying of any subsequent unfair labor practices.[16]

In addition, our colleague's position would require the employer to suffer ever-mounting backpay for one violation simply because the employer has committed another violation. We believe that each violation is to be remedied on its own basis, and that the power of injunctive relief and contempt can be used for repeat violations.

Finally, we agree that some reinstatement offers can be shown to be in bad faith. For example, if it can be shown that the employer, at the time of the offer of reinstatement, harbored an intention to discriminate against the employee after reinstatement, we might well find the offer to be in bad faith.[17] However, we do not believe that such a finding can be based solely on the fact that, subsequent to the offer of reinstatement, unlawful conduct was directed to others.[18]

[13] *Esterline Electronics Corp*., supra, 290 NLRB at 835. See generally *C-F Air Freight*, 276 NLRB 481, 482 (1985) (where a discriminatee does not respond to a valid offer of reinstatement, the backpay period is tolled on the date of the last opportunity to accept the offer).

[14] See *C-F Air Freight*, supra.

[15] Our dissenting colleague notes that the discriminatees herein, like any other discriminatees, have a duty to mitigate damage by seeking other work. We agree. However, our point is that, under our colleague's view, the discriminatees can decline the Respondent's offer and still receive mounting backpay.

[16] Our dissenting colleague would distinguish between employees who are working and those who are offered work. She would not apply the "work now, grieve later" principle to the latter. We see no basis for the distinction. In both, the employee can work and earn wages while protesting the allegedly unlawful conduct.

[17] See *Red Rock*, supra, where the employer, *concurrently with the offer of reinstatement to two employees*, was discharging those employees. See also *Ertel Mfg. Corp.*, supra, where an offer ostensibly made to 20 employees, was in bad faith as to 16 employees because there were only 4 jobs available.

[18] We disagree with our colleague as to certain dates. The initial offer to Creten was made on April 15, 1994. The unlawful conduct directed to Mains occurred on May 4, 1994.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified[19] and set forth in full below and orders that the Respondent, Krist Oil Co., Iron River, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging, disciplining, attempting to blackball, assigning onerous work to, surveilling, denying wages or work to, retraining, or otherwise discriminating against, any employee for engaging in concerted activity protected by Section 7 of the Act.

(b) Threatening to blackball or otherwise punish employees because they engage in concerted activity protected by Section 7 of the Act.

(c) Reinstating employees as trainees, assigning onerous work to employees, requiring employees to work under the surveillance of a supervisor, depriving employees of work or wages, disciplining employees, or otherwise discriminating against employees because they have filed charges or given testimony under the Act.

(d) Promulgating no-solicitation or no-distribution rules, or any other rules regarding employee speech or use of the Respondent's CB radios, for the purpose of discouraging concerted activity protected by Section 7 of the Act.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Yvonne Mains full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Yvonne Mains whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(c) Make Jodi Creten, Richard Johnson, and Brian Koski whole for any loss of earnings and other benefits suffered through April 25, 1994, as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Yvonne Mains, Jodi Creten, Richard Johnson, and Brian Koski, as well as any reference to the unlawful written employee conference record and letter of reprimand issued to employee Donald Maglio on April 21, 1994, and within 3 days thereafter notify them in writing that this has been done and that the discharges, conference record, and letter of reprimand will not be used against them in any way.

(e) Make Donald Maglio whole for the 1 hour's wages he lost as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(f) Make Yvonne Mains whole for the 1 day's wages she lost as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(g) Notify U.P. Special Delivery, Inc., in writing, that the Respondent is disavowing and withdrawing its false, derogatory job reference of January 13, 1994, regarding Richard Johnson, and notify Johnson that this has been done.

(h) Rescind and abrogate its discriminatorily promulgated rules regarding solicitation of employees by other employees, distribution of literature between employees, creating or repeating any false, defamatory, or derogatory statements and the use of the Respondent's CB radios by its employees.

(i) Preserve, and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Iron River and Escanaba, Michigan, facilities copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed either or both of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since May 18, 1993.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[19] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER FOX, dissenting in part.

Unlike my colleagues, I would find that the Respondent's offers of reinstatement to Jodi Creten, Richard Johnson, and Brian Koski were invalid and did not satisfy the Respondent's reinstatement obligation or toll its backpay liability to these discriminatees. For the reasons set forth below, I would find that the Respondent's offer of reinstatement to these employees was not in good faith and that the employees were therefore not obligated to accept it.

The essential facts are set out by my colleagues. We all agree with the judge's findings that, immediately following its reinstatement of Yvonne Mains on May 4, 1994,[1] the Respondent violated Section 8(a)(1) and (4) of the Act by failing to reinstate her to her original position and by otherwise mistreating her because of her role as a charging party in the unfair labor practice proceeding and her participation in protected activities. My colleagues and I agree that her reinstatement was accordingly invalid, but we do not agree on whether the Respondent's reinstatement offers to the other three discriminatees should also be found invalid and therefore ineffective to satisfy the reinstatement obligation and toll their backpay.

In finding the reinstatement offers to Creten, Johnson, and Koski to be valid, my colleagues rely on a line of Board cases which hold, in effect, that an employee who has been the victim of an unlawful discharge forfeits her right to reinstatement and cuts off her entitlement to backpay if she refuses an offer of reinstatement that is valid on its face, even if it is later shown that had she accepted the offer, she would have been subjected by the employer to further unlawful treatment. Thus, for example, in *Florida Steel Corp.*, 273 NLRB 889 (1984), one of the cases relied upon by the majority, the Board found that an employer's facially valid offers of reinstatement to two unlawfully discharged employees were sufficient to cut off the employees' reinstatement and backpay rights, even though the record was "clear" that had they accepted the offers, the employer would have placed them in entry level positions, "in violation of the terms of the Board's order." 273 NLRB at 917. And in *Eastern Die Co.*, 142 NLRB 601, 603 (1963), the Board refused to order reinstatement and tolled the backpay award of an unlawfully discharged worker who failed to accept an offer of reinstatement, despite finding that four other discriminatees who accepted the same offer and returned to work were subjected to further mistreatment, including being told "that they must use the side entrance of the plant to enter and leave their work, that if they went downstairs into the die department they would be summarily dismissed . . . that they had to work in isolated booths, that they could not talk to or mingle with their fellow workers during coffee breaks . . . and that they were not allowed to wear gloves to protect their hands while working on the polishing wheels." Under this line of cases, it is immaterial whether the employer had any intention of acting lawfully when it made its offer or whether it *in fact* engaged in concurrent or subsequent misconduct. All that matters is whether the employee was aware, at the time the offer was refused, of circumstances that would render the offer invalid. *Research Designing Service, Inc.*, 141 NLRB 211, 216–217 (1963).

In my view, this line of cases undermines the remedial purposes of the Act because it allows wrongdoing employers to escape responsibility for remedying their unlawful conduct and prevents the victims of their wrongdoing from obtaining the relief to which they would otherwise be entitled for no other reason than that they did not subject themselves to further unlawful treatment. These cases are also at odds with another, conflicting line of Board decisions which hold that offers of reinstatement must be made in good faith, and that continuing misconduct by the employer can render an offer invalid without regard to whether the employees to whom the offer was made were aware of the misconduct. Thus, in *Red Rock Co.* 84 NLRB 521 (1949), the Board found that the failure of two unlawfully discharged employees to respond to a facially valid offer of reinstatement did not preclude a Board order requiring their reinstatement with "unabated backpay" because the offer was not made in good faith. "The Respondents, concurrently with their offer . . . were discriminatorily discharging these two employees and engaging in other conduct violative of the Act, thereby demonstrating the complete lack of good faith with which their offer of reinstatement was made," the Board explained. "Under these circumstances, we find that the Respondents had no intention of rehiring [the discriminatees] and that the discharged employees were, therefore, not obligated to apply for reinstatement." Id. at 529. Similarly, in *Ertel Mfg. Corp*., 147 NLRB 312 (1964), enfd. 352 F.2d 916 (7th Cir. 1965), discriminatorily discharged employees who did not respond to an employer's offer of reinstatement were nevertheless held to be entitled to reinstatement and full backpay because the employer's offer was extended to 20 discriminatees when in fact the employer had only four jobs available. The trial examiner found, with Board approval, that the employer's offer was "bona fide" only as to the four employees who were actually rehired. 147 NLRB at 333. In neither *Red Rock* nor *Ertel* was it deemed relevant whether the discriminatees knew of the circumstances found to have rendered the offers invalid at the time they elected not to respond to the offers; rather, the emphasis was on the *employer's* good faith or lack of good faith in extending the offers. See also *Selig Mfg. Co., Inc.*, 79 NLRB 1144, 1145 (1948) (employer's offer of reinstatement "not made in good faith or with the intention of fulfilling its obliga-

[1] All dates are in 1994 unless otherwise stated.

tions under the Act" does not constitute reinstatement within the meaning of the Act); *Exeter Coal Co.*, 154 NLRB 1678, 1693 fn. 31 (1965) (considering whether "an offer, apparently good on its face, is token or otherwise not one in good faith"); *Esterline Electronics Corp*., 290 NLRB 834, 835 (1988) (referring to "'requirement of good faith dealings' properly imposed on both employer and employee" with regard to reinstatement offers).

The cases relied on by my colleagues to deny full relief to the three employees who did not respond to the Respondent's offer have essentially read the employer "good faith" requirement out of this area of the law in favor of an objective standard that focuses solely on what the employee knew or believed. They have done so, however, without overruling or attempting to reconcile this opposing line of decisions. In my view, the better approach would be to clarify the standard for determining the validity of an offer of reinstatement by adopting an approach which retains the focus on the employer's "good faith" but measures that good faith by objective evidence of the employer's conduct.

Under this standard, an employer who has made a facially valid, unconditional offer of reinstatement would be able to rely on that offer as tolling its backpay obligations *provided* that the employer engages in no conduct that would belie the good faith of that offer. Thus, as long as the employer engages in no further conduct demonstrating an intent not to comply with its obligations under the Act, backpay would be tolled regardless of what the employee to whom the offer is made may have believed might happen to him if he accepted the offer. Conversely, if the employer is subsequently found to have engaged in further misconduct demonstrating that the offer was not in good faith—for example, continuing discrimination against employees engaged in the type of protected activity for which the discriminatee being offered reinstatement was discharged or, as here, mistreatment of other discriminatees who have accepted offers of reinstatement and returned to work—the reinstatement offer would be ineffective to toll backpay or satisfy the employer's reinstatement obligation, regardless of whether the employee actually knew of the employer's continued misconduct.[2]

I do not suggest that a discriminatee should be allowed, with impunity, to simply ignore an offer of reinstatement or reject it out of hand. Under the test I would apply, an employee who rejected a facially valid unconditional offer of reinstatement, without objective knowledge of circumstances that would invalidate the offer, would do so at her own risk. Absent evidence to the contrary, the offer would be presumed to have been made in good faith and would therefore be deemed to have tolled the employer's obligation to provide backpay and satisfied its obligation to offer reinstatement, regardless of any personal doubts the employee might have harbored about the treatment she would be afforded if she accepted the offer. Only if it were subsequently shown by objective evidence that the employer had engaged in conduct belying the good faith of the offer would the failure to accept the offer be excused.

In setting forth these principles, I am attempting to accommodate legitimate interests of both discriminatees and employers. In my view, an employee who has already suffered the consequences of an unlawful discharge should not have to give up whatever other employment he may have obtained, and subject himself to possible further mistreatment by an employer that is continuing to violate the requirements of the law, in order to avoid forfeiting rights to reinstatement and backpay.[3] On the other hand, an employer that has ceased its unlawful conduct and is making a good-faith effort to remedy that conduct should be able to limit its liability.

Here, the Respondent's offer of reinstatement to Mains was—we all agree—*demonstrably* in bad faith and invalid. And, considering the Respondent's contemporaneous unfair labor practices, the conclusion is simply inescapable that the Respondent's offers of reinstatement to

[2] My colleagues attack my standard for having no "definitive time limitations," with the result that even unlawful conduct "months and years later" can taint an offer. They are correct only if, by "definitive," they mean a specific amount of time to be applied in any case. I recognize that subsequent unfair labor practices might be too minor or too distant in time to warrant an inference that the original reinstatement offers were made in bad faith. Such an inquiry is no more difficult than determining whether prior unlawful conduct has tainted a withdrawal of recognition or whether away-from-the-bargaining table misconduct is evidence that bargaining is in bad faith. It is a matter of reasonable inferences. Certainly, here it is not difficult to conclude that misconduct following the Respondent's offers of reinstatement showed that the offers were made in bad faith. As explained below, unlawful retaliation against driver Maglio began within a week after the reinstatement offers to fellow drivers Johnson and Koski, and the unlawful treatment of discriminatee Mains commenced on the first day of her return to work and within 24 hours of the May 3 reinstatement offer to discriminatee Creten, which included assurances that there would be no discrimination against her. Hence, contrary to my colleagues, this case is not greatly different from *Red Rock Co.,* supra, and *Ertel Mfg. Co.*, supra.

Regarding my colleagues' concern about an employer's having to face "ever mounting backpay" as the result of misconduct subsequent to the reinstatement offer, I note that under my standard employees would still have to satisfy the normal obligation to mitigate liability by seeking comparable employment and not unreasonably refusing to accept or abandoning another job.

[3] An unlawfully discharged employee who may have obtained, or have the prospect of obtaining, other employment to support himself in the meantime is not in the same position as a current employee whose employer has committed an unfair labor practice short of discharge against him. It is one thing to expect an employee to continue working while seeking a remedy from the Board or contractual procedures (at least if the circumstances are not so egregious as to constitute a constructive discharge), and another to expect an employee to abandon other employment he has obtained or has the prospect of obtaining, even if the reinstatement offer turns out to have been made in bad faith. Thus, I do not agree with my colleagues that my proposed standard for treating reinstatement offers is inconsistent with the "obey and grieve" principle.

Creten, Johnson, and Koski were equally in bad faith, and equally invalid

Thus, at the same time that the Respondent was making its offers of reinstatement to the three discriminatees in question, and in the midst of the unfair labor practice hearing in this proceeding, the Respondent was aggressively pursuing its ongoing campaign of discriminatory mistreatment of its employees, in retaliation for their participation in this very proceeding, and also in order to block their attempts to exercise their rights under Section 7 of the Act. Specifically, the Respondent discriminatorily warned and reprimanded Donald Maglio in violation of Section 8(a)(1) and (4) for testifying against the Respondent in this case, just 2 days after he testified, and less than a week after the Respondent's April 15 offers of reinstatement to Maglio's fellow discriminatee drivers Johnson and Koski at Iron River (along with cashier Creten at Escanaba).

Apparently not content with polluting the April 15 rounds of reinstatement offers, the Respondent followed suit a couple of weeks later by contaminating its May 3 round of reinstatement offers. It victimized Mains in violation of Section 8(a)(1) and (4) on her first day back at work on May 4 (thus invalidating *her* reinstatement) and it did so within 24 hours of the May 3 offers of reinstatement to Mains' fellow discriminatee, cashier Creten at Escanaba (along with drivers Johnson and Koski at Iron River).

Finally, the Respondent capped off its unlawful conduct by retaliatorily promulgating restrictions on communications among employees just days after the May 3 offers of reinstatement, and just days before the recessed hearing in this case was set to resume.

To the extent that the cases my colleagues rely on hold that in order for a discriminatee not to have her backpay tolled by a facially valid offer of reinstatement, she must be shown to have had actual knowledge of a respondent's contemporaneous unfair labor practices that would invalidate the reinstatement offer, I would find any such requirement to be unjustified as contrary to the general statutory policy that requires a transgressor to bear the burden of the consequences stemming from its illegal acts.[4] Applying that policy here, a determination of whether Creten, Johnson, or Koski had actual knowledge of the Respondent's contemporaneous unfair labor practices is not, in my view, dispositive of whether, under the circumstances, the Respondent's offers of reinstatement tolled the entitlement of these discriminatees. Any doubts about the reasons for the discriminatees' failure to accept the Respondent's offers of reinstatement must be resolved not against the discriminatees, the victims of the Respondent's first round of unfair labor practices, but against the Respondent itself, which, after all, set the stage for any such uncertainty by engaging in a second round of unfair labor practices during the same time that it was offering reinstatement to the discriminatees.[5]

My colleagues make much out of what is *not* in the record—express, affirmative evidence that Creten, Johnson, and Koski had actual knowledge of the Respondent's unfair labor practices against Maglio and Mains at the time of the May 3 offers of reinstatement. But I am focusing on what *is* in the record, and what, indeed, permeates it—the Respondent's disregard for the rights of its employees, including the one who *did* take the Respondent's reinstatement bait, at the same time that the Respondent was trolling with the same lure for the other discriminatees. Consequently, I would find that actual knowledge by the employees of the Respondent's unfair labor practices is not necessary to the result that I reach. Rather, in consideration of the unfair labor practices against Maglio and Mains individually, and against the work force in general, and the simultaneity of these unfair labor practices with the offers of reinstatement, I find that the Respondent's offers of reinstatement to Creten, Johnson, and Koski were not made in good faith, were not valid, and thus did not relieve the Respondent of its reinstatement and backpay obligations to them.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, discipline, attempt to blackball, assign onerous work to, surveil, deny wages or work to, retrain, or otherwise discriminate against, any employee for exercising any right protected by Section 7 of the Act.

[4] See *Hendrickson Bros*., 299 NLRB 442 (1990); *Consolidated Freightways*, 290 NLRB 771 (1988), enfd. as modified 892 F.2d 1052 (D.C. Cir. 1989), citing *Sheet Metal Workers Local 355 (Zinsco Electrical Products*), 254 NLRB 773 (1981), enfd. in part, remanded in part 716 F.2d 1249 (9th Cir. 1983); *Solboro Knitting Mills*, 227 NLRB 738 (1977) ("It rest[s] upon the tortfeasor to disentangle the consequences for which it [is] chargeable from those from which it [is] immune.").

[5] See generally *Amsterdam Wrecking & Salvage Co. v. Teamstesr Local 294,* 472 F.2d 153 (2d Cir. 1973).

WE WILL NOT threaten to blackball or otherwise punish employees because they engage in concerted activity protected by Section 7 of the Act.

WE WILL NOT reinstate employees as trainees, assign onerous work to employees, require employees to work under the surveillance of a supervisor, deprive employees of work or wages, discipline employees, blackball employees, or otherwise discriminate against employees because they have filed charges or given testimony under the Act.

WE WILL NOT put into effect any no-solicitation or no-distribution rules, or any other rules regarding employee speech or use of our CB radios by employees, for the purpose of discouraging you from engaging in any concerted activity protected by Section 7 of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Yvonne Mains full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make Yvonne Mains whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL make Jodi Creten, Richard Johnson, and Brian Koski whole for any loss of earnings and other benefits suffered through April 25, 1994, resulting from their discharges, less any net interim earnings, plus interest.

WE WILL make Donald Maglio whole for the 1 hour's wages we refused to pay him for delivering a split load on April 17, 1994, plus interest.

WE WILL make Yvonne Mains whole for the 1 day's wages she lost because we refused to permit her to work on May 6, 1994, plus interest.

WE WILL rescind and abrogate our rules regarding solicitation of employees by other employees, distribution of literature between employees, creation or repetition of any false, defamatory, or derogatory statements, and the use of our CB radios by our employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges of Yvonne Mains, Jodi Creten, Richard Johnson, and Brian Koski, as well as any reference to the unlawful written employee conference record and letter of reprimand issued to Donald Maglio on April 21, 1994, and WE WILL, within 3 days thereafter, notify these employees in writing that this has been done and that we will not use these adverse personnel actions against them in any way.

WE WILL notify U.P. Special Delivery, Inc., in writing, that we are disavowing and withdrawing our false derogatory job reference of January 13, 1994, regarding Richard Johnson, and WE WILL notify Richard Johnson in writing that this has been done.

KRIST OIL COMPANY

Rocky L. Coe, Esq., for the General Counsel.
Steve J. Polich, Esq. (Polich & Hinshaw) and *Donn Atanasoff, Esq.,* of Iron River, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Iron City, Michigan, on April 19 and 20 and May 17, 1994, and in Escanaba, Michigan, on May 18 and 19, 1994. The charge in Case 30–CA–12137 was filed on June 1, 1993,[1] the complaint was issued on July 30 alleging that the Respondent, Krist Oil Co., Inc. (the Company), discharged employees Yvonne Mains and Jodi Creten because they engaged in concerted activities protected by Section 7 of the Act, and thereby violated Section 8(a)(1) of the National Labor Relations Act. Thereafter, further charges were filed in Case 30–CA–12370–1 on December 14, in Case 30–CA–12476 on March 22, 1994, and in Case 30–CA–12535 on May 10, 1994.

On March 30, 1994, an order consolidating cases and amended consolidated complaint issued, including the original allegations regarding employee Mains and Creten and further allegations that the Company had violated Section 8(a)(1) of the Act by discharging employee Richard Johnson, attempting to "blackball'' Johnson's prospective employment, threatening employees with blackballing, and discharging employee Brian Koski because they engaged in concerted activity protected by Section 7 of the Act. Further, on May 17, 1994, on motion of the General Counsel of the National Labor Relations Board (the Board), I consolidated Case 30–CA–12535 with the other cases captioned above, and amended the consolidated complaint to allege that the Company violated Section 8(a)(1) and (4) of the Act by reinstating Mains as a trainee, assigning her to an onerous and excessive task, and keeping her under surveillance by requiring her to work on the same schedule as her supervisor, depriving her of 1 day's work, withholding 1 hour's pay from Donald Maglio, and threatening him with discipline up to and including discharge, all because they filed unfair labor practice charges or testified in these proceedings, and because they engaged in protected concerted activity, and, further, that the Company violated Section 8(a)(1) of the Act by imposing overly broad no-solicitation and no-distribution rules on the employees at its Escanaba and Iron River facilities. The Company has denied all of these allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, has maintained an office and place of business in Iron River, Michigan, where it has been engaged in the distribution of oil and the operation of a retail convenience store located in Escanaba, Michigan. During the 12-month period ending March 30, 1994, the Company, in conducting its business operations described above, derived

[1] All dates are in 1993 unless otherwise indicated.

gross revenues in excess of $500,000, and purchased and received goods valued in excess of $5000 directly from points located outside the State of Michigan. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. No labor organization is involved in these cases.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Yvonne Mains and Jodi Creten

1. The facts

At the beginning of 1993, the Company employed Yvonne Mains and Jodi Creten as cashiers at its Escanaba store, under the immediate supervision of Store Manager Denise O'Donnell. The Company hired Mains in July 1992 and Creten in December of that year. The Escanaba store is 1 of 39 gas station and convenience store facilities owned and operated by the Company in the Upper Peninsular of Michigan and in Wisconsin. David Chartier, who hired Mains and Creten, supervised the Escanaba store and at least 9 other company stores. Chartier's immediate superior was Director of Marketing Richard Smetak, who reported to the Company's general manager and general counsel, Donn Atanasoff.

At the time of her hire, Chartier told Mains that her primary duty was to wait on customers. If she had time remaining Mains was to help stock and clean the store. In February, however, Store Manager O'Donnell held a meeting with Escanaba cashiers Mains, Creten, Michelle Quaburgh, Melinda Vaness, and Alissa Zulonowski and issued a written list of chores. There were 15 daily requirements for each of the three shifts, including sweeping and mopping floors, emptying garbage, cleaning and stocking restrooms, stocking and facing shelves, coolers, and the freezer, cleaning the driveway and the backroom, cleaning and stocking fast food, stocking cigarettes, putting out overstock, keeping windshield buckets clean and full, and keeping cash low by making safe drops. The fast food activity required some baking, attention to condiment dispensers, and preparation of hot dogs, popcorn, hot chocolate, and coffee. In addition to the listed duties, O'Donnell required Creten, who worked the third shift, from 11 p.m. to 7 a.m., to check the fuel supply by inserting a measuring stick into the tanks serving the gas station.[2]

Mains balked at O'Donnell's list of chores. She remarked that a cashier on the 3 to 11 p.m. shift would find it impossible to accomplish them and wait on customers. One or two of the other cashiers at the meeting said it would be difficult to watch the gas pumps to make sure customers did not drive off without paying for the fuel they had taken and clean a shelf in the back.

Denise O'Donnell replied that as the employees at the Company's Wells, Michigan store had managed to get those chores done, the Escanaba store employees could do as well. O'Donnell said that the Escanaba employees would get the chores done. She also directed the cashiers to report for work 15 minutes before the beginning of their respective shifts to permit the cashier who was working to complete some of her chores.

Following O'Donnell's meeting, in February or March, Mains, Creten, Quaburgh, and Victoria Corwin agreed to and did help each other perform the chores. On one occasion, Mains came to the Escanaba store to permit Creten to go to the bathroom. Mains emptied garbage cans at the store for Corwin and Quaburgh. The four also came in to work early and used the additional time to help each other.[3]

On or about February 13, Creten and employee Quaburgh had agreed to split the 3 to 11 p.m. shift so that Creten would work from 3 to 7 p.m. and Quaburgh would work the remaining 4 hours. While Creten was working her 4 hours, O'Donnell called to tell her that Quaburgh was unable to come to work, and that Creten would work an extra hour. When Creten replied that she could not work the extra hour because her babysitter would not be available for the extra time, O'Donnell insisted that she had no choice but to work. Creten said she could not. Abruptly, O'Donnell hung up. Creten quickly called her back for an explanation, O'Donnell said she had hung up to avoid saying something in an angry way. The conversation ended without any further discussion of Creten's plight.

About 7:15 p.m., O'Donnell arrived at the Escanaba store and told Creten to leave. Creten said O'Donnell owed her an apology. O'Donnell rejected Creten's suggestion and added that she could have required Creten to work until 11 p.m. without any recourse on Creten's part. The heated discussion ended when O'Donnell again told her to leave.

On arriving home, Creten telephoned David Chartier but he was not available. Creten told Chartier's wife about her encounter with O'Donnell and that she needed to talk to him "immediately.'' At this, Chartier's wife got off the phone and quickly returned to say that David had told her to tell Creten to call him back. Creten made one more attempt to call David on the following Monday but did not reach him. He never returned her call.

During the same month, Creten, a single parent, found she could not continue to work on Saturdays because her mother would no longer babysit Creten's son. On learning of Creten's problem, O'Donnell assured her that it would be taken care of. Thereafter, to her chagrin, Creten found that she continued to receive Saturday assignments. Creten continued to send notes to O'Donnell, protesting her Saturday assignments. In late March or early April, Creten was scheduled for a Saturday and tried to find a babysitter. She sent a protest note to O'Donnell, who finally notified Creten on the preceding Friday that she need not report for work on the next day.

On the morning of February 27, Yvonne Mains noted that Melinda Vaness, the cashier, who had worked the previous afternoon had counted a gas coupon's face value of $25 as part of her receipts and thus showed a $20 overage. Mains knew that prior to February 26, $20 of the coupon's face value had been counted as receipts as the customer was using it up $5 at a time. In her view, Vaness was actually $1.98 short. Mains did not want to give the impression that she was accusing Vaness of theft. Fearing that Mains, however, might be held responsible for the shortage, Mains sought an explanation of Vaness's procedure from O'Donnell on Monday, March 1, but could not reach her until March 3. After Mains asked her question, O'Donnell said that Mains did not know what she was talking about. That ended Mains' inquiry.

[2] My findings of fact regarding the Company's store operations and management are based on Donn Atanasoff's testimony. My findings of fact regarding the employees' duties, their meeting with Store Manager O'Donnell, and her response to their complaints about the checklist are based on Mains' and Creten's testimony.

[3] I based my findings regarding the employees' reaction to O'Donnell's checklist requirements on Creten's and Mains' testimony.

Approximately 2 weeks later, in mid-March, O'Donnell reduced Mains' worktime from 2 days per week to 1 day per week. This reduction came after Mains had told O'Donnell that she could not financially stand to work less than 2 days per week. At the beginning of April, Mains asked O'Donnell for extra hours during that month. Instead of granting Mains' request, the Company assigned the cashier from the 11 p.m. to 7 a.m. shift at Wells to the Escanaba store and closed the Wells store down for those 8 hours.

On April 3, Mains came to work at 3 p.m. and relieved cashier Melinda Vaness. Mains noticed some money in a bank bag in the top drawer directly beneath the cash register. Mains asked what that money was. Vaness answered that she had dropped it from the drawer. When Mains asked for a receipt, Vaness said she had thrown it away. Mains became upset at the absence of a document showing how much money had been dropped from her drawer. Mains counted the money in the bag and came up with $160. She then studied a tape showing that Vaness had dropped $185. Mains saw that $25 was missing and became alarmed. She quickly called Richard Smetak, who was the supervisor on duty. She said she wanted to call the police. He told her to calm down. Business in the store picked up. Mains had to hang up and call him back.

Mains told Smetak about the shortage. She said she would retain the tape as the only proof she had if the drawer came up short. Smetak agreed.

The conversation continued. Mains recounted how in September 1992 Supervisor Chartier, in furtherance of his sting operation against a cashier, had instructed Mains to short the employee's drawer $20, to see if the employee was making up shortages by removing money from the store's coin safe. Mains told Smetak of her initial refusal to remove the money and of how she finally had carried out Chartier's instruction. Mains also told Smetak that the sting operation had made her fearful of being the subject of a similar investigation. Smetak said he had heard rumors about Chartier and his treatment of employees and cash shortages, in particular. Smetak said he wanted to talk to Mains in detail about this topic. He also said he would look into the matters she raised and get back to her.

Following her conversation with Smetak, Mains told employees Creten, Corwin, and Quaburgh about the coupon incident and her conversation with Smetak. The four employees discussed their grievances and concerns regarding wages, hours, and working conditions at the Company's Escanaba store. They agreed to form a united front "to cover [their] butts collectively.'' Following this discussion, Mains received phone calls from employees Quaburgh and Creten about cash shortages and situations in which self-service gas customers had driven off without paying.

On April 20, O'Donnell issued two written warnings to Jodi Creten. On the same day, Creten signed both warnings, acknowledging the asserted infractions. These were the first warnings issued by the Company to Creten since hiring her on December 16, 1992.

I find from Creten's credible testimony, that O'Donnell explained the reasons for the warnings as she issued them. Thus, O'Donnell told Creten that the first warning was for not sticking the fuel tanks properly and the second for a piece of toilet paper on the bathroom floor, fingerprints on the store's front door, mud on the floor, and not putting another 12-pack of beer in the cooler.

At the hearing, counsel for the General Counsel asked Creten to identify the two warnings and their attachments, all of which the Company had taken from its files in response to the General Counsel' subpoena. Creten, testifying in a frank manner, asserted that she had received the two warnings with attachments, but not those offered to her at the hearing. She flatly denied ever seeing the latter prior to the hearing. On the General Counsel's motion, and without objection by the Company, I received both warnings and their current attachments in evidence.

Each of the identified exhibits bears what appears to be Denise O'Donnell's signature. Also, the contents of two of the attachments strongly suggest that O'Donnell was their author. Yet, the Company did not offer her as a witness to shed light on the origin of the attachments received in evidence in these proceedings. Nor did the Company present Dave Chartier to explain an attachment, dated April 20, bearing what appears to be his signature. I find that the current attachments to the warnings issued to, and signed by Creten on April 20, were substituted for the original attachments, after she signed the warnings.[4]

The first warning's single attachment, offered by the General Counsel, stated that on April 12, while assigned to the 11 p.m. to 7 a.m. shift, Creten had failed to complete the cleaning checklist. The warning complained about the restroom, reporting paper on the restroom floor, mud on the sink, a dirty toilet, and a muddy floor. The warning also complained that the "pop machine hadn't been filled with ice, the oil shelves were not filled (we had plenty of oil in the backroom to be put out front), shelves were not faced, cooler was not faced.''

The second written warning, offered by the General Counsel, had two attachments. The first attachment complained that Creten was improperly using a measuring stick to check on the amounts of fuel in the store's tanks, reading the stick wrong, not sticking the tanks at all, or "just guessing.'' The first attachment ended with the assertion that "this has been going on since she began working for us last December.''

The second attachment was a note apparently from Store Supervisor Chartier stating, in substance, that on the morning of April 20, after receiving word of incorrect stick readings at the Escanaba store, he investigated and found that she had not done any sticking.

In December 1992, when she was hired, the Company gave Creten 3-day training in her job. She began sticking gas tanks on the fourth day of her employment. Until April 20 she had regularly performed that task without criticism from her superiors. When O'Donnell issued the first warning on April 20, Creten challenged it, insisting that she had been correctly sticking the tanks whenever she worked on the night shift.[5]

[4] Richard Smetak testified that the statements now attached to O'Donnell's warnings of April 20 were attached to them when he saw them in April. Smetak's attempt on cross-examination, however, to repudiate his admission in an affidavit he gave to the Board by attributing it to the Board agent who took the affidavit, his often evasive responses, his self-contradiction, and my impression that he was treating the hearing as a game, cast serious doubt on his credibility. In contrast, Creten showed appropriate respect for the hearing, and impressed me as being a frank witness on direct examination, and on cross-examination. Accordingly, I have rejected Smetak's testimony, and credited Mains, when their testimony conflicted.

[5] I have credited Creten's testimony regarding her confrontation with O'Donnell regarding sticking fuel tanks.

On or about April 24, Smetak and Mains set up a meeting at her home, near Escanaba, on May 6, at 4 p.m., to discuss her concerns about the $25 cash shortage, where the money might have gone, and her responsibility. Smetak agreed that she could have whoever else she wanted at this meeting. He suggested that they bring whatever documentation they needed to support their complaints.[6]

The meeting took place on May 6 at Mains' home. Smetak arrived 3 hours late. In addition to Mains and Smetak, the meeting was attended by employees Creten, Quaburgh, Corwin, former Escanaba Store Manager Donna Grove, and some ex-employees, including Dan Williams and Cheryl Rose, and the father of a current employee.

At the beginning of the meeting, Mains told Ric Smetak that she and her colleagues were "an official employees union'' and that they were "organized as basically a sorority'' as they were all females. Smetak did not respond to Mains' opening remarks

Mains began discussing a list of employee concerns she had prepared. Smetak took extensive notes and responded to her remarks. She raised a complaint about the Company's 3-day training period without pay. Smetak said he would look into it. Employee complaints about the Company's hourly starting wages drew the same response from Smetak. Other topics included O'Donnell's requirement that employees report to work 15 minutes before their shifts began without additional compensation, the Company's failure to make good on a promise of periodic written performance evaluations of employees, the Company's failure to pay the employees for their overtime, and David Chartier's refusal to intercede with O'Donnell on behalf of the employees, when they had complaints. Mains spoke of the low morale among the four employees who had banded together to help each other. She also spoke of the intentional shorting of an employee's drawer. The employees joined in the discussions regarding wages and hours, work schedules, drawer shortages, and the complaints about the requirement that they reimburse the Company for drive-offs at the gas station.

In preparation for this meeting, Victoria Corwin had copied some figures showing overages and shortages at the Escanaba gas station and drive-offs. Smetak looked at Corwin's copied material and noted that Melinda Vaness had a drive-off almost every other time she worked as a cashier. He accused Vaness of "stealing us blind.''

Corwin told Smetak that a man recently released from prison, who she referred to as "a lunatic,'' was harassing her on the 11 p.m. shift. Cowin asked Smetak to provide someone to work with her as security against these visits.

The assembled employees complained that O'Donnell did not give them adequate breaks and that at times they did not even have time to go to the bathroom and tend to their needs. He suggested that when necessary, and when no one was pumping gas, they could close the store, tend to their needs, and then open up again.

The employees complained about O'Donnell's cleaning list and how difficult it was to complete during a shift. The employees told Smetak that Jodi Creten's writeups for cleaning list infractions had been in reprisal for her complaints about weekend hours. They expressed fear that O'Donnell might treat them all similarly and said that this concern was the reason for their united front.

Smetak explained that the list was to be a guidline, that employees were to do the best they could, and that it was not intended as a disciplinary tool. Jodi Creten told of how O'Donnell had written her up for fingerprints on a door, a piece of toilet paper on a bathroom floor, and one 12-pack of beer missing in the cooler. Creten complained that these were trivial infractions of the cleaning list and caused the employees to be concerned. Smetak said he would talk to O'Donnell about this matter. He called the writeups "ridiculous.''

Creten talked about the warnings that O'Donnell had recently issued to her about failing to complete the cleaning checklist and not sticking the gas tanks properly. Creten pointed out that the writeup for improperly sticking the gas tanks had come after Creten had been using a measuring stick on the Escanaba gas tanks for 4 months without either a complaint or retraining from the Company. Creten insisted to Smetak that she had performed this duty regularly, watched by a friend at an Amoco station, across the street from the Company's Escanaba store.

Smetak also assured Creten that he would intercede on her behalf with O'Donnell. As he gave this assurance, Smetak revealed that O'Donnell had already decided to discharge Creten. Creten went to work the next evening and never heard anything from O'Donnell about termination.

Creten complained about O'Donnell's slow response to her request to be relieved of Saturday hours. Also, Creten complained that O'Donnell had insisted that she choose between her son and her job.

Mains complained that in April, when she was available to work additional hours and had so notified O'Donnell, the Company had ignored her. Mains told Smetak that instead of giving her the extra hours, the Company had closed its Wells, Michigan store for one shift, and assigned its cashier to the Escanaba store. Smetak seemed sympathetic toward Mains.

Mains and the other employees express concern about write-ups and firing. Smetak assured the employees that firing was "absolutely the last resort'' for him and that he "always believed in retraining.'' Smetak said that firing was the "last thing'' the listening employees had to worry about.

Mains told Smetak that she had seen employee Melinda Vaness leaving the Escanaba store with a case of pizza, which, to Mains' knowledge, the store had not written off as spoiled. Smetak said he would investigate the matter. He also wondered if the pizza was connected with a $4000 inventory shortage, which had surfaced at the Escanaba store 2 months after Denise O'Donnell took over as its manager.

Toward the meeting's end, Smetak asked all remaining participants to sign the last page of his notebook. He also asked them if they had been sexually harassed and received a negative response that he recorded in his notebook.[7]

[6] I based my findings of fact regarding the agreement to have a meeting on May 6, on Smetak's and Mains' testimony. When their testimony conflicted, however, I have credited Mains for the reasons stated above in fn. 4.

[7] Smetak testified before me that during the meeting of May 6 he did not get the impression that there was a concern about working conditions. Instead, according to Smetak, the bulk of the meeting of May 6 consisted of references to Store Manager O'Donnell as a "fucking bitch,'' accusations of sexual misconduct against company officials, and insults against Smetak. The seven pages of notes he took at the same meeting, however, and the affidavit he gave to a Board agent on June 25 do not contain any hint that the meeting described in Smetak's testimony occurred. Nor did his testimony show that he took exception, became irate, or walked out when he discovered that the meeting had

In his afffidavit given to a Board agent on June 25, Smetak, in his account of the meeting of May 6, asserted that "Yvonne and Jodi did most of the talking regarding the complaints that were presented.''[8]

Just before he left for home, Mains told Smetak that he had 2 weeks to deal with the matters raised at the meeting. On the expiration of the 2 weeks she and her colleagues would "contact the Teamsters Union.'' As he departed, Smetak looked at Mains and said, "Please don't do anything drastic. I promise I will take care of this.''

On May 17 Mains telephoned Smetak at his home. Mains expressed concern at his failure to get back to her and fear that she and her colleagues would be fired. Smetak told her to get a good night's sleep and not to worry. He also said people were lying to him and that he was investigating.

On the following day, May 18, Dave Chartier contacted Mains by phone and announced her termination. She asked to speak to Smetak and asked him why she was being fired. Smetak said he did not want to discuss it, but said that she would receive a letter "in the next couple of days.'' He also said that the basic factor was that she had been insubordinate and that the meeting of May 6 "had a lot to do with it.''

Prior to May 18, the Company had never disciplined Mains. Neither Denise O'Donnell nor Dave Chartier had ever warned her. Nor had anyone from the Company's management threatened her with discharge.

Soon after her conversation with Smetak, Mains received a dismissal letter from the Company, dated May 19, and bearing Chartier's and Smetak's signatures. The letter's contents were as follows:

> 1. Falsely accusing other employee's for cash shortages.
>
> 2. Creating a mutinous situation with fellow employee's.
>
> 3. Creating a mutinous situation between Ric Smetak and a Krist Oil store supervisor.
>
> 4. Causing dissension among fellow employee's towards each other and Krist Oil Company.
>
> 5. Making detrimental and false statements about her employer—Krist Oil Company.
>
> 6. Uncooperative with store manager.
>
> This in itself is satisfactory cause for dismissal.

In his affidavit of June 25 Ric Smetak asserted that the decision to discharge Mains was solely his. Smetak also declared that he based his decision "on her poor work performance, but most particularly, her false accusations of theft against Melinda and Denise and Cindy, a new employee, who soon quit.'' His affidavit did not mention any of the complaints listed in the quoted letter.

On May 18, Dave Chartier called Creten and told her that she was terminated. Creten asked what she was being terminated for. Chartier said it was because she did not get along with management and other crew members. Creten asked to speak to Smetak. When Smetak got on the phone, she repeated her question, and received the same answer Chartier had given. Creten told Smetak she did not understand what was going on. Smetak said he had to go, said goodbye, and hung up.

Shortly thereafter, Creten received a letter from the Company, dated May 19, and signed by Chartier and Smetak. The letter said nothing about not getting along with management and other crew members. Instead, the text of the letter was as follows:

> 1. Failure to perform assigned duties.
> 2. Improperly sticking tanks.
> 3. Not sticking tanks and reporting false readings.
> 4. Failure to report for assigned scheduled shifts.
> 5. Refusal to work assigned scheduled shifts.
>
> Upon reviewing the entire situation as listed above, just cause was reached in the termination of employment with Krist Oil Company.

In his affidavit of June 25 Smetak said nothing about getting along with management and other crew members. Instead, he asserted, "As far as I was concerned, Jodi's attendance and work schedule problems were not the focus of her termination. What really swayed me was her failure to stick the tanks; an extremely important requirement for us.''

On June 1, Mains, Creten, and employee Greg DeVere filed an unfair labor practice charge in Case 30–CA–12137 captioned above. The charge alleged, among other matters, that Mains' and Creten's terminations violated Section 8(a)(1) of the Act. Mains, Creten, DeVere, and employee Vikki Corwin filed an amended charge in the same case 6 days later, which also included the same two terminations among its allegations.

By letter dated April 15, 1994, the Company offered to Jodi Creten unconditional reinstatement to her former position and said she could return to work on April 25 or sooner. The letter requested that Creten contact Smetak and work out her schedule and any questions she might have. The letter also asked Creten to let the Company know if she did not intend to return. Creten received the letter but did not respond.

The Company, by letter of May 3, 1994, again offered unconditional reinstatement to Creten. The letter also assured her that the Company would not discriminate against her or retaliate against her because of the litigation pending before the Board. Again, Creten received the letter and has not responded.

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taken on the claimed nasty tone. The testimony of employees Mains, Creten, and Corwin did not lend any support to Smetak's testimony in this regard. Smetak's effort to explain the contrast between his testimony and his notes and affidavit was that he did not want to put such bad language in writing. He did not explain why this sensitivity, however, did not cause him to protest or walk out. In sum, Smetak's notes and affidavit, his inadequate explanation, and my impression that he was a reluctant witness persuaded me to reject his account of the meeting of May 6. Instead, I have credited Mains, Corwin, and Creten in this regard.

[8] On cross-examination, Smetak denied that Creten and Mains did most of the talking at the meeting of May 6. Later, when confronted with the affidavit he gave to a Board agent, which contained the quoted language, Smetak testified that they were not his words and attributed them to the Board agent. After he was shown his signature at the bottom of the last page, however, and his initials next to changes, Smetak conceded that he had made that assertion. Under further cross-examination, he attempted to narrow his assertion to mean that they were most vocal employees at the meeting. In light of his attempt to repudiate his affidavit, however, and attribute his clear admission to the Board agent, I find that Smetak was more interested in assisting the Company's cause than in providing his best recollection of the circumstances leading up to his decision to discharge Creten and Mains. This serious infirmity in Smetak's credibility persuaded me that his attempt to alter the meaning of his testimony was nothing more than a recent contrivance designed to weaken the effect of his earlier admission under oath.

In April 1994, the Company in a letter signed by Donn Atanasoff offered unconditional reinstatement to Yvonne Mains and instructed her to contact Rick Smetak. Mains conferred with Smetak, who said he would get back to her on April 25, 1994, Smetak called and told her she could start on the following day on an 8 a.m. to 4 p.m. shift. He told her there would be a letter telling her what shift she would be on, and that she could pick it up after 5 p.m. at the Escanaba store. Mains picked up the letter that changed her to an 8 a.m. to 3 p.m. shift, Monday through Friday. In addition to this change in hours, Mains found the letter's contents substantially different from her expectations after conferring with Smetak. Mains concluded that the Company's reinstatement offer was "insincere.'' She did not report for work at the Escanaba store until the Company had sent a further offer of reinstatement.

On May 3, 1994, the Company delivered another letter to Mains, offering unconditional reinstatement to an 8 a.m. to 3 p.m. shift, and assuring her that she would not be "harassed in any way in violation of any state or [F]ederal law.'' Mains reported to the Company's Escanaba store on May 4, 1994, at 8 a.m. She reacquainted herself with the store's cash register and the cash-drop procedures.

Five minutes after Mains' arrival at work, on the morning of May 5, 1994, Manager Denise O'Donnell assigned her to cleaning the store's shelves. Thereafter, for a few minutes short of 7 hours Mains cleaned shelves. Mains recognized that this was an unusual and onerous assignment for one employee. Mains had not spent more than 2 percent of her working time cleaning shelves since the inception of her employment by the Company in July 1992. Usually, O'Donnell divided the cleaning of shelves over three shifts, for 3 days, on a weekend. Each cashier would clean a section or part of a section of shelves along with her other duties. On May 5, 1994, Mains assumed that she would clean only one section of shelves and either be relieved by another employee, or directed to wait on customers when the store became busy. Neither of these events occurred, however. O'Donnell remained at the store until about 10 or 11 a.m. Another employee came on and worked the cash register. Mains considered this to be a an unpleasant assignment and felt harassed.[9]

On the afternoon of May 5, 1994, Richard Smetak came to the Escanaba store and greeted Mains as she was working. She asked him if she was expected to work on the following day as she had noticed that her name was not on the schedule. Smetak answered that by all means he expected her to work on that day. She asked him if she would be cleaning shelves for 7 hours or something else as she was not happy cleaning shelves. Smetak replied, in substance, that Mains' work assignment was up to O'Donnell.[10]

On the evening of Thursday, May 5, 1994, Mains worked the 11 p.m. shift at her other job. During her shift she got in touch with O'Donnell, who told Mains that she need not report for her scheduled shift on May 6, 1994, because O'Donnell would be out of town. O'Donnell also explained that Mains' training would resume on the following Monday, 8 a.m. to 3 p.m. In his testimony, Smetak admitted that O'Donnell had scheduled Mains to work with the store manager for the purpose of training.[11]

Mains reported for work on Friday morning as scheduled. Another employee was working the cash register. The employee gave a note to Mains, which reported that O'Donnell was out of town and that Mains' training would resume on Monday. Mains did not work on May 6, 1994, and lost 1 day's pay.

I find from Mains' testimony that during her training, which began on May 4, 1994, O'Donnell told her that there was not much new for her to learn. According to Mains' credited testimony, only the ringing up of diesel discounts was "a little bit different.'' The remainder of her duties as a cashier had not changed since her termination. I also find from Mains' undisputed testimony that as of May 18, 1994, Smetak had told Mains that her training period would end 2 days later.

2. Analysis and conclusions

Section 7 of the Act provides that employees have the right to engage in "concerted activities'' for self-organization and "for the purpose of . . . mutual aid or protection.'' Thus the provisions of Section 7 of the Act extend protection to employees, who, because they have no union representing them, have "to speak for themselves as best they [can].'' *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 14 (1962). Accord: *Dayton Typographic Service v. NLRB*, 778 F.2d 1188, 1190–1192 (6th Cir. 1985).

Section 8(a)(1) of the Act makes it an "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise'' of section 7 rights. Id. *Dayton Typographic Service v. NLRB*. It follows that if, as the General Counsel contends, the Company discharged employees Creten and Mains for engaging in concerted activities protected by the Act, it thereby violated Section 8(a)(1) of the Act. *Washington Aluminum Co*., supra; *Lloyd A. Fry Roofing Co*., 651 F.2d 442, 446 (6th Cir. 1981).

Whether Mains' and Creten's discharges violated Section 8(a)(1) of the Act depends on the Company's motive. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400–403 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases, as expressed in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that test, a violation of Section 8(a)(1) of the Act will be found when the General Counsel has shown that the Company's opposition to protected concerted activity was a motivating factor in a company decision to discharge Mains and Creten and when the record shows that the Company would not have discharged them in the absence of their protected activity. *Gatliff Coal Co*., 301 NLRB 793, 798 (1991).

I find that by their participation at the meeting of May 6 with Richard Smetak, a senior member of the Company's management, Mains and Creten along with employees Quaburgh and Corwin were attempting to improve the wages, hours, and conditions of employment at the Escanaba store. Mains' list of

[9] I have based my findings regarding Mains' work assignment on May 5, 1994, on her undisputed and credible testimony.

[10] I based my findings regarding Mains' conversation with Smetak on May 5, 1994, on her undisputed and credible testimony.

[11] Smetak testified on direct examination that "Ms. Mains is not a trainee.'' He retreated somewhat from that assertion, when he testified that she was working with O'Donnell "for readjustment or what have you. Refamiliarization of the store.'' Later, however, on cross-examination, he conceded that O'Donnell told him that she was training or retraining Mains or helping Mains to learn new things. O'Donnell did not testify.

concerns found echo in the voices of Quaburgh, Creten, and Corwin, as they all informed Smetak of a wide range of concerns including wages, work schedules, O'Donnell's checklist, drawer shortages, performance evaluations, overtime wages, drawer shortages, breaks, disciplinary writeups, store security, and drive-offs. When Mains, Corwin, Quaburgh, and Creten spoke to Smetak at the meeting about these matters they did so on behalf of themselves and the other employees present. It is well settled that "individual employees bringing truly group complaints to the attention of management'' are engaged in concerted activity. *Meyers Industries*, 281 NLRB 882, 887 (1986). When, as here, such concerted activity involved employee complaints regarding wages, hours, and conditions of employment, it was also protected by Section 7 of the Act. *NLRB v. Lloyd A. Fry Roofing Co*., supra, 651 F.2d at 445; *Edward's Restaurant & Lounge*, 305 NLRB 1097, 1098 (1992).

There is ample evidence to show that on and after May 6, the Company knew that Mains and Creten were engaged in protected concerted activity. At the meeting's outset, Mains told Smetak, the Company's director of marketing, that she and the employees present were "an official employees union'' and "organized as basically a sorority.'' Smetak's seven pages of notes, headed, "Areas of Concern,'' reflect all the topics that Main had also listed on her agenda notes in preparation for the meeting. His notes also show that Mains and Creten frequently voiced matters that concerned them and the other employees attending the meeting. The last page of Smetak's notes begins with, "5/6/93 Meeting with current & previous Esky employees!'' At the meeting, Smetak treated the employees as a group when he explained O'Donnell's cleaning list, responded to the employees' complaints about breaks, and told of his policy toward writeups and firings. Thus, he showed recognition of problems mutually shared by the assembled Escanaba employees. In short, on May 6, Smetak was made aware of the concerted nature of Mains' and Creten's participation in the presentation of group complaints. He was also aware, as he left Mains' house, that she was speaking for the group when she warned that unless they heard from him by the end of 2 weeks they would contact the Teamsters.

The circumstances immediately leading up to the two discharges suggest that Smetak, who authored them, did so in reprisal for Creten's and Mains' roles in the meeting of May 6. Less than 2 weeks after his meeting with the Escanaba store employees Smetak fired Creten and Mains without warning. He picked on the two at the meeting who had done "most of the talking regarding the complaints that were presented.'' Further, on the day he discharged her, Smetak admitted to Mains that the meeting on May 6 "had a lot to do with it.'' In sum, I find that the General Counsel has made a prima facie showing that Creten's and Mains' protected concerted activity was a motivating factor in the Company's decision to discharge them.

The Company contends that the record shows that a business purpose motivated its discharges of Creten and Mains and that those discharges would have occurred even if they had not engaged in concerted activities. Smetak, the company official who discharged them, testified that the meeting of May 6 had nothing to do with their discharges. Smetak impaired his credibility in this regard on May 18, however, when he admitted to Mains that the meeting "had a lot to do with it.'' Analysis of the proffered defense reveals infirmities that refute Smetak's disclaimer and the Company's contention.

Initially, the Company provided shifting and inconsistent reasons beginning on May 18, and ending in its posthearing brief. On May 18, Smetak told Mains that the basic factor in her discharge was that she had been insubordinate. In the discharge letter that followed on May 19 there was no allegation of insubordination. Instead, Smetak and Chartier accused Mains of falsely accusing other employees for cash shortages, creating mutinous situations, causing dissension, making detrimental and false statements about the Company, and being uncooperative with her store manager. In his affidavit of June 25, Smetak forgot about the insubordination, the mutinous situations, the dissension, and improper remarks about the Company. Smetak, under oath, declared that he discharged Mains because of poor work performance "but most particularly'' because of "her false accusations of theft against Melinda and Denise and Cindy, a new employee who soon quit.''

In his testimony before me, Smetak abandoned Mains' poor work performance and asserted that "the number one reason'' for her termination was that she "had continuosly accused other people of stealing from her and falsely accused other people of cash shortages.'' When confronted with the list in his letter of May 19, Smetak testified as follows:

> Reasons two through six are an embodiment of the number one reason. Creating a mutinous situation with fellow employees. Number three, creating a mutinous situation between Rick Smetak and a Krist Oil store supervisor. Number four, causing dissension among fellow employees towards each other and Krist Oil Company. And number six, being uncooperative with her store manager. Which I guess could be construed as insubordination.

In the next portion of his testimony, Smetak takes responsibility for the decision to terminate Mains. He focuses on one reason for this decision, "she was picking on other employees within the store, that she was accusing anybody and everybody that ever worked with her.''

When Company counsel asked if the meeting of May 6 played any significant part in Mains' termination, however, Smetak took the opportunity to add another reason. He answered:

> The only portion of that meeting that I felt had significant part was her continued accusations against myself, Dave Chartier, Donn Atanasoff and her accusations of cash shortages of other employees within that store, and that's the truth.

At page 19 of its posthearing brief, the Company suggests two reasons that Smetak failed to include in his array. The brief states in pertinent part:

> Mains[‘] conduct by her direct involvement in the cash shortage transactions and her actions to shift the focus by pitting other store workers against each other are good reasons for her discharge.

Smetak also provided a kaleidoscope of reasons for discharging Creten. On May 18, he told Jodi Creten that he was terminating her because she did not get along with management and other crew members. In his letter to Creten, however, on the following day, Smetak abandoned those two reasons and alleged five work-related shortcomings as his grounds for firing her. He included complaints about failing to report for assigned shifts and refusal to work scheduled shifts. Yet in the affidavit he gave to a Board agent, Smetak zeroed in on only one con-

cern, "failure to stick the tanks.'' At the hearing, Smetak added insubordination, which consisted of "[r]efusal to stick the tanks according to the manager's instructions.''

Smetak's resort to shifting and inconsistent reasons for terminating the two most outspoken employees, who participated in the concerted protected activity on May 6 seriously impaired the credibility of the Company's assertion that business reasons motivated his decision. Indeed, it seemed to me that Smetak and the Company were coming up with new reasons as they went along. By offering shifting and inconsistent reasons to explain Mains' and Creten's discharges, Smetak also added to the indicia of his unlawful intent. *C.D.S. Lines, Inc*., 313 NLRB 296, 300 (1993). Accord: *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984).

Smetak's efforts to explain his decision also suffer from the absence of substance. Thus, he has not shown that Mains falsely accused anyone of cash shortages. He testified about the results of an investigation involving records and cash reports but did not share their contents with me. Smetak did not divulge the names of the individuals who Mains accused. He testified that she was accusing "anybody and everybody that ever worked with her.'' Later, on cross-examination, he testified in substance that she had accused everyone she had worked with "[a]t some time and point in her employment.'' But he cast serious doubt on the reliability of that broad claim when he admitted that she had not accused fellow employees Jodi Creten, Michelle Quaburgh, or Victoria Corwin of stealing. Subtracting these three from the Escanaba store's employee complement created a sizeable gap in the number of employees whom Mains could have accused falsely. Smetak has not provided any details, however, to shore up his own accusation against Mains.

Smetak did serious harm to his credibility when he testified that Mains' accusations against him, Chartier, and Donn Atanasoff, at the meeting of May 6, played a significant part in his decision to get rid of her. As I have noted above, in footnote 7, neither Smetak's notes nor his pretrial affidavit make any reference to the use of vulgar language, insults, or accusations of sexual misconduct by the employees during the meeting of May 6. Nor did Smetak's notes, affidavit, or testimony show that he protested the use of such language or walked out of the meeting rather than tolerate it. These flaws in his account of the meeting, his evasiveness, and his efforts to repudiate his admission that Mains and Creten did most of the talking about the employees' complaints, persuaded me that he was reaching for expedient answers to camouflage the real reason for Mains' and Creten's discharges.

Nor did Smetak fare much better in his effort to show that Creten's failure to properly stick and record the contents of the Escanaba store's fuel tanks was the main reason for her termination. On the afternoon of May 18, 1994, he testified in these proceedings, as follows:

> After my full investigation of her work performance I felt it was absolutely necessary that she quit falsifying tank chart records that I have a record of and that it was necessary to terminate Ms. Creten. I felt that she was not sticking gasoline tanks properly. She was not reading them properly. I felt that I had enough evidence based upon the the supervisor telling me so in April, the store manager telling me so in April, and motor fuel inventory records that I had received from Denise O'Donnell that showed fluctuations of 1,400 gallons, a thousand gallons, 2000 gallons, et cetera. It is of utmost importance to stick these tanks and I felt it necessary the termination was in order.

At this point, Counsel for the General Counsel Coe said he had not heard this last answer and that Smetak had run "a bunch of numbers across.'' I asked the witness, "It was a thousand, wasn't it?'' Smetak answered, "1,000, 2,000, 3,000.'' Smetak presented no records showing where these number originated. He gave no dates for these fluctuations. He seemed to be dealing in abstract numbers. He testified that of the various numbers in the inventory records, "1,473 is one that comes to mind.''

On cross-examination, on the following morning, Smetak denied that he had testified the previous afternoon that the inventory fluctuations attributed to Creten's tank sticking were in the thousands of gallons. Smetak now testified that he had mentioned "60, 100, 1,000, 1,400, 1,700, for example.'' On Coe's further cross-examination, Smetak denied that the figures he had presented on the previous day were examples of Creten's errors. Smetak next testified that the level of mistakes she had made were "in the amounts of 69 gallons, 1,700 gallons, 1,400 gallons, 190 gallons—and these are all inaccurate, as I do not have those figures memorized.'' Here, again, Smetak was improvising.

In his testimony regarding his decision to fire Creten, Smetak stressed the "utmost importance'' of properly sticking the Escanaba store's fuel tanks. He also testified that in April his investigation revealed enough evidence to justify discharging Creten. Later, under cross-examination, he first testified that he had allowed Creten's sticking problem to continue for 30 days. Then, under further prodding, he testified that in February, he first found out about Creten's problem with sticking tanks, and that he had known about it for 4 months before he discharged her on May 18. Assuming that Creten had a chronic problem with sticking gasoline tanks, and that Smetak knew about it as early as February, urgency did not overtake him until 4 months later. In the meantime, he claimed his investigation and records convinced him in April that he must terminate her. Yet he did nothing about firing her until 12 days after the meeting of May 6, when she took a leading role in presenting employee complaints regarding conditions of employment. Here, Smetak's explanation of his decision to fire Creten is unsupported by records and rebuted by his testimony on cross-examination.

In sum, I find that the Company has failed to rebut the General Counsel's prima facie case, showing that Smetak terminated Mains and Creten in reprisal for their leading role in concerted activity protected by Section 7 of the Act. Accordingly, I further find that by these terminations, the Company violated Section 8(a)(1) of the Act.

The General Counsel also alleged that by discharging Mains and Creten, the Company violated Section 8(a)(4) of the Act. That provision of the Act makes it an unfair labor practice "to discharge or otherwise discriminate against an employee because he [or she] has filed charges or given testimony under [the] Act.'' The Company denied this allegation. As the evidence showed that these discharges occurred well before Creten and Mains filed their charge and amended charge against the Company, I find no merit in this allegation and shall recommend its dismissal.

The Company contends that it made valid unconditional offers of reinstatement to Mains and Creten in April and May 1994. The General Counsel disputes the validity of these offers

of reinstatement and urges me to find that the Company violated Section 8(a)(1) and (4) of the Act by reinstating Mains as a trainee, assigning her to onerous and excessive work, subjecting her to surveillance by permitting her to work only in accordance with her immediate supervisor's work schedule, and by refusing to permit her to work on a day when her supervisor was not at work, thereby depriving Mains of 1 day's pay. I find merit in the General Counsel's challenges to the offers of reinstatement and his allegations regarding the Company's treatment of Mains on and after May 4, 1994.

To be valid, an offer of reinstatement to a discharged employee must be firm, clear, unconditional, and made in good faith. *Brenal Electric*, 271 NLRB 1557 (1984). Here, I find much to negate the Company's claim of good faith. In April 1994, and again on May 3, 1994, the Company offered unconditional reinstatement to Yvonne Mains. The offer of May 3, 1994, also assured Mains that the Company would not unlawfully harass her. Five minutes after she reported for work on May 5, however, the Company made Mains unhappy. Her immediate supervisor, Denise O'Donnell, assigned almost 7 hours of shelf cleaning to Mains. This was an unusual and onerous assignment for one employee. Mains had not spent more than 2 percent of her working time cleaning shelves since the inception of her employment by the Company in July 1992. Usually, O'Donnell divided this task over three shifts for 3 days over a weekend. Each cashier would clean a section of shelves along with her other duties.

Further, on May 4, 1994, the Company did not reinstate Mains to her former position as a fully trained cashier. Instead, the Company brought her back to work as a trainee, with working hours the same as those enjoyed by her supposed mentor, Store Manager O'Donnell. The Company has not shown the necessity for such training. Nor has the Company offered to explain why it limited Mains' working hours to those assigned to the store manager. In any event, on May 4, 1994, Mains quickly reacquainted herself with the working of her till, and received instructions from O'Donnell on a procedure for ringing up diesel discounts. O'Donnell explained that the Escanaba store's procedures were pretty much the same as they had been when Mains had left in 1993. On May 6, 1994, only 2 days after her reinstatement, the Company deprived Mains of employment and pay for 1 day on the excuse that O'Donnell was not working on that day. As of May 18, 1994, the Company continued to classify Mains as a trainee. I find from its treatment of Yvonne Mains on and after May 4, 1994, that the Company's offers of reinstatement to her in April and May 1994 were not made in good faith.

I find that Mains' participation in the meeting of May 6, and her role as a Charging Party in Case 30–CA–12137, were motivating factors in the Company's decision to reinstate her as a trainee, schedule her work so that O'Donnell could keep an eye on her, and require her to clean shelves for almost seven hours. I have arrived at this inference after considering the Company's unlawful conduct prior to May 4, 1994.

The Company showed hostility toward Mains' and Creten's leading roles in the meeting of May 6, when it discharged them on May 18 in violation of Section 8(a)(1) of the Act. As found below, the Company resorted to similar unfair labor practices on July 26, when it terminated employees Johnson and Koski at its Iron River base facility, because they engaged in similar conduct protected by Section 7 of the Act. The commencement of the hearing in the cases involving those unlawful discharges began on April 19 and 20, 1994. This event may well have added fire to the Company's demonstrated hostility toward Mains. Thus, in early May 1994, when Mains accepted its offer of reinstatement, I find it likely that the Company's management, including Smetak and O'Donnell, were not happy to see her back.

The harshness of the treatment that O'Donnell inflicted on Mains after she returned to work on May 4, 1994, provided strong evidence of the Company's displeasure at having her back in the Escanaba store. By tying Mains' hours of employment to her own, and treating her as a trainee, O'Donnell could keep watch on Mains and discourage the employee from engaging in discussions of working conditions and other mutual concerns with other company employees. O'Donnell, with Smetak's blessing, harassed Mains by inflicting almost 7 hours of disagreeable work on her. Finally, O'Donnell inflicted financial loss on Mains by depriving her of a shift and wages on May 6, 1994.

The Company did not offer any explanation sufficient to rebut the General Counsel's prima facie showing that Mains participation in the meeting of May 6 and her role as a charging party in the instant proceedings, were motivating factors in the Company's decision to inflict on her the punishment detailed above, when she attempt to return to her former employment on and after May 4, 1994.[12] Accordingly, I find that the Company, by this conduct toward Mains, violated Section 8(a)(1) and (4) of the Act.

The treatment that the Company accorded Mains when she accepted its offer of reinstatement suggested that a similar reception awaited Creten. After all, the Company had terminated both of them for their leadership of the employees at the meeting of May 6 with Smetak. Further, Creten was a charging party in Case 30–CA–12137, as was Mains. Thus, it was likely that if Creten accepted the offers of reinstatement dated April 15, 1994, and May 3, 1994, respectively, the Company would have inflicted harsh treatment on her similar to that which it devised for Mains.

The Company's offers of reinstatement to Creten must also be viewed in light of the Company's persistence in violating the Act in April and May 1994, as found below, when it discriminated against employee Donald Maglio because he testified in these proceedings, and again when it imposed unlawful restrictions on its employees' exercise of rights protected by Section 7 of the Act. These additional violations added to the already considerable risk confronting Creten. I find, therefore, that the Company's offers of reinstatement, made to Creten on April 15 and May 3, 1994, were not made in good faith. See *Woodline Motor Freight*, 278 NLRB 1141, 1143 (1986), enfd. in pertinent part 843 F.2d 285, 291 (8th Cir. 1988).

B. Richard Johnson and Brian Koski

1. The facts

The Company hired Richard Johnson and Brian Koski in 1991, and employed them as part of a group of 12 to 15 tank truckdrivers, based at its Iron River, Michigan headquarters, under the immediate supervision of Fleet Supervisor Edward Jardanowski. The tank truckdrivers' principal function was to

[12] In a letter to Mains, dated May 3, 1994, Smetak explained why the Company had assigned her to the day shift. The Company has never provided an adequate explanation of why it would not permit Mains to work on the day shift on May 6, 1994.

deliver fuel to the Company's 39 Citgo/Quick Mart convenience stores in the Upper Peninsula of Michigan and in Wisconsin.

On July 14, the Company issued the following notice to its tank truckdrivers:

> EFFECTIVE JULY 1, 1993 KRIST OIL WILL NO LONGER ALLOW ANY HOURS FOR WAREHOUSE ORDER DELIVERY, CHANGING LIGHTBULBS ON CANOPIES, GAS PUMP HOSE OR NOZZLE REPLACEMENTS, OR GARBAGE PICK-UP. ALL TRUCK DRIVERS ARE REQUIRED TO TAKE WAREHOUSE ORDERS, CHANGE HOSES, NOZZLES OR CANOPY BULBS WHEN REQUESTED, PICK UP GARBAGE, AND ALSO PICK UP MAIL.
>
> IN OTHER WORDS, NONE OF YOUR DUTIES ARE CHANGING, AND ALTERNATIVELY WE WILL ADJUST YOUR MILEAGE RATE UPWARD BY 1/2 [CENT]. ALL PAY WILL BE BASED UPON MILES ONLY. THE LOW MILEAGE TRIPS WILL BE ASSIGNED AS EQUALLY AS POSSIBLE.
>
> WE HAVE ALSO DECIDED TO PUT A CAP ON THE AMOUNT WE WILL PAY FOR HEALTH INSURANCE. PATTI LEONOFF WILL BE ISSUING A NOTE OF EXPLANATION IN THE NEAR FUTURE.

Thereafter, in July, the Company issued a second notice announcing, in pertinent part:

> Effective immediately the Krist Oil Co mileage rate will be increased by 1/2 cent per mile. This is to compensate you for the grocery repair and garbage work you are asked to do.
>
> This increase is in addition to the 1/2 cent you received on July 1, 1993. Your next pay check will be adjusted to make the increase retroactive to July 1st.

On reading the quoted notice, Johnson, Koski, and the Company's other Iron River-based tank truck drivers became upset about the changes in wages. The drivers decided to have a meeting to consider what to do about the loss of hourly wages that the Company had heretofore granted for the chores listed in the notice. The meeting was scheduled for July 20, after work, at a park in Iron River.

On July 17, at a Company Citgo gas station in Iron River, John Baldwin approached employee Richard Johnson and stated that he had just quit his job with the Company because of the above-quoted notice. General Manager Donn Atanasoff joined them and criticized Baldwin for quitting. Donn said that the two 1/2-cent increases would adequately compensate the drivers for loss occasioned by the policy changes.

Employee Johnson took exception to Donn's remarks, arguing that the 1/2-cent increases were not enough. Johnson mentioned that the drivers were planning a meeting among themselves, at which they planned to draft a letter setting forth their wishes, which they would present to Donn. Donn replied that he wanted to hear from the employees.[13]

A few days before the drivers' meeting, Company President Krist Atanasoff met employee Brian Koski in the Company's Iron River parking lot. Krist motioned, trying to get Koski to approach Atanasoff's truck. Koski ignored Krist's gesture. Krist moved his truck toward Koski and again motioned to get Koski into the truck. When Koski opened the truck door, Krist asked why Koski and the other drivers were "so pissed off.'' Koski answered in substance that the men were "mad'' because they were losing money.

Using a chart, Krist tried vainly to convince Koski that the drivers would be making money rather than losing it under the Company's new wage policy. Krist threw the chart into the back seat of his truck and in substance said that the Company and its drivers had to work the problem out. Finally, Krist warned that if the employees started organizing, he would blackball Koski from Iron River and any job Koski held in the county.[14]

On July 20, Richard Johnson, Brian Koski, Donald Maglio, and six other company drivers met in a small park in Iron River. Koski told his colleagues of Krist Atanasoff's threat to use blackballing if the employees began organizing. The assemblage began discussing holiday pay, vacations, and loading and unloading pay. They drew up a list of demands including improved wages, holiday pay, no overnight runs, and a change in vacation policy. I find from Maglio's uncontradicted testimony that he incorporated the list in a letter, which he prepared for presentation to the Company. The employees selected Richard Johnson to present the letter on behalf of the drivers, referred to in the letter as "the Krist Oil Transport Drivers.''

Johnson presented the letter to Krist Atanasoff on July 23 or 24. Krist read the letter and said he would show it to his father, Stan, and to brother Donn. Johnson remarked that some of the demands on the letter were negotiable and warned that if the Company did not deal with them it would lose drivers.

On Monday, July 26, Fleet Supervisor Jardanowski issued discharge notices to Johnson and Koski. At the top of each notice was the inscription: "RULES OF CONDUCT VIOLATIONS WARRANTING IMMEDIATE TERMINATION OF EMPLOYMENT.'' The first paragraph of each notice read:

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[13] Donn Atanasoff testified that at the time he terminated Johnson and Koski, he knew nothing about their efforts to organize the Company's drivers and nothing about a meeting. He also denied that Johnson told him about a scheduled drivers' meeting. After much questioning and evasion, Atanasoff conceded that prior to his decision to fire the two drivers, he assumed the drivers had a meeting. As Johnson impressed me as a more candid witness, however, who seemed conscienteous about giving his full recollection, I have credited his account of their meeting, rather than Don Atanasoff's.

[14] Krist Atanasoff testified about a conversation with Koski in the latter part of July, after the Company issued its memo of July 14. According to Krist, he asked Koski why there was hostility and dissension among the tanker drivers. Krist also testified that he broke off the discussion when Koski became emotional. In response to a leading question about whether he had threatened Koski in any fashion, Krist testified, "No.'' On cross-examination, Krist's recollection of details of the conversation suffered from lapses of memory. He also testified that until this proceeding, he had no knowledge of the term "blackballing.'' Krist did not deny using language, however, that Koski might have interpreted to mean "blackballing.'' In any event, his convenient lapses of memory cast doubt on the reliability of his account of his remarks to Koski. His quick resort to pleas of "can't remember'' and "I don't know'' suggested that Krist was not conscientious about searching his memory. Given this infirmity in his testimony, his claim that he had never heard the widely used term "blackballing'' prior to these proceedings is difficult to credit, as Krist is 37 years old and has been in the business world for 20 years. In contrast, Brian Koski testified about this conversation, apparently presenting his best recollection, in a full and forthright manner. Accordingly, I have credited Koski's testimony in this regard.

> You have engaged in misconduct jeopardizing the operations of Krist Oil Company. You have attempted to confuse or frustrate the transportation and distribution operations of Krist Oil Company, hence have engaged in conduct which shows complete and total disregard for your employer's interests. In addition, you have created a document which contains demands for wage increases, increased holiday or vacation pay and terms, additional compensation over and above mileage rate currently in effect, along with a demand that overnight runs be elminated.

The second paragraph of each letter gave the following additional specification of misconduct:

> A review of your logbook records shows that you have deliberately and falsely logged excessive "in-service'' hours during week days in order to get weekends off. As you know, weekend gasoline deliveries are critically important in Krist Oil's operation, and you have made false entries in your logbook in order to make yourself unavailable for work on weekends, contrary to the terms of the at will relationship.

A third paragraph in Ed Jardanowski's letter to Brian Koski was as follows:

> You have made regular statements to your co-workers and superiors that you will be quitting your job in the near future, including telling company President Krist Atanasoff on May 15, 1993 that you were seeking alternative employment. It is Krist Oil's position that you are deliberately making the false logbook entries to place the Company in violation of DOT regulations. It appears that you are willing to jeopardize the operation of Krist Oil Company and breach policy to further your own ends.

The letters end with the following paragraph:

> Based on the above, your conduct, performance, attitude towards your job and misconduct has resulted in a review of your employment with Krist Oil, and it has been decided that your employment with Krist Oil is terminated immediately. You are hereby discharged.

During their employment at the Company, neither Ed Jardanowski nor Donn Atanasoff nor any other member of its management had disciplined Johnson or Koski. Nor had the Company ever warned either of them about any aspect of their performance or conduct, including logbook and timecard entries.

On November 18, at a hearing before the Michigan Employment Security Commission, Ed Jardanowski, testifying under oath, admitted that Donn Atanasoff made the decision to fire Johnson and Koski, and that Donn told Ed that he was firing them because they arranged the meeting with the other drivers and presented the letter with the drivers demands to the Company. At the same hearing, Ed Jardanowski also admitted that the drivers' letter caused the Company to fear that the drivers would quit or go on strike. He further testified that the Company felt that the list of employee demands, which Johnson had presented to Krist Atanasoff, was a threat to its operation. Absent from Jardanowski's testimony before the State's commission was any claim that false logs played any part in Donn's decision to fire Johnson and Koski.[15]

In October, President Krist Atanasoff met Koski in a company warehouse and, in the course of conversation, said, "If you ever want to come back to work for this outfit, you know, we can let bygones be bygones. You know, come on back. We need good—we need some—we need drivers.'' Koski left the warehouse without responding to Krist's offer. Thereafter, by letters dated April 15, 1994, and May 3, 1994, respectively, the Company made unconditional offers of reinstatement to Koski, who has not responded to these offers.

In January 1994, Johnson was seeking employment as a transport driver at U.P. Special Delivery, Inc. When Johnson's prospective employer inquired about Johnson at the Company, Jardanowski said he would not rehire Johnson because he had engaged in timecard fraud. Jardanowski later confirmed his response on a reference tracer that U.P. Special Delivery sent to him for signature. The discharge letter that Jardanowski issued to Johnson on July 26 did not mention timecard fraud.

Following discussions between some of its officials and Johnson in February 1994 the Company made three written offers of reinstatement to him this year. The first, dated March 11, 1994, recited that the Company was offering him reinstatement to his former driving position at full pay and benefits, and with credit for previous employment toward 2 weeks of vacation. The Company did not make it an unconditional offer, however. By letters of April 15, 1994, and May 3, 1994, the Company made unconditional offers of reinstatement to Richard Johnson. Johnson has not responded to these offers.

2. Analysis and conclusions

The General Counsel urges me to find that the Company discharged Koski and Johnson because of their apparent leadership in the organizing of the Iron River drivers, which resulted in a list of demands by those employee for improved wages and conditions of employment. Koski had argued with Krist about the Company's new wage policy. Johnson had told Donn that the drivers were unhappy with those policies and intended to meet about them. It was Johnson who presented the employees' demands to Krist. According to the General Counsel, here, as at the Escanaba store, the Company discharged two employees because they had engaged in concerted activity protected by Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act. In its brief, the Company contends that it fired Koski and Johnson because they were the worst offenders among the drivers who were falsifying mileage logs and timecards. Applying

[15] At the hearing before me, Ed Jardanowski, after listening to a tape, which the State of Michigan subsequently certified to be a true copy of the proceedings before the Michigan Employment Security Commission, denied that the voice, which the tape identified as his, was his. Jardanowski admitted before me that he had testified at an unemployment compensation hearing involving Johnson and Koski, however, in which the Company was disputing their claims for unemployment benefits. Jardanowski also admitted that at the State's proceedings he had testified that the Company felt that Johnson and Koski were a threat; that Koski, Johnson, and the drivers composed a letter that they gave to the Company through Krist Atanasoff; that the drivers were looking for more money; and that it was Donn Atanasoff's decision to terminate Johnson and Koski. These same admissions were contained in the State's certified tape. Jardanowski's attempt to repudiate his taped admissions together with his subsequent denial that he had given an affidavit to a Board agent, followed by an admisson on cross-examination that he had given such an affidavit, and his attempt to repudiate the same affidavit in answer to a leading question by counsel for the Company, cast considerable doubt on Jardanowski's credibility when he testified in support of the Company's explanation for Johnson's and Koski's discharges.

the principles recited in my discussion of the Escanaba discharges, I find merit in the General Counsel's position.

I find that Johnson and Koski by their participation in the organizing of and the conduct of the meeting of July 20, and their roles in the preparation of the list of demands as a result of that meeting, engaged in concerted activity protected by Section 7 of the Act. I also find that as early as July 17 Krist Atanasoff and his brother Donn were aware of the pending meeting and its purpose.

That the Company was hostile to employees who sought to exercise Section 7 rights was suggested by its resort to unlawful discharges to punish employees Mains and Creten 2 months earlier. Such hostility surfaced shortly before the Iron River drivers meeting. At that juncture, Company President Krist Atanasoff violated Section 8(a)(1) of the Act when he threatened to impair Koski's employment opportunities in Iron River, and the surrounding county, by blackballing him if he organized the Company's drivers. Certainly, the timing of Johnson's and Koski's unheralded discharges, only 2 or 3 days after Johnson had submitted the drivers' demands to President Krist, provides further evidence that the drivers' meeting and the demands arising from the meeting had provoked Krist and his brother Donn.

The Company's discharge letters, referring to the drivers' demands, and Fleet Supervisor Ed Jardanowski's testimony on the Company's behalf before the Michigan Employment Security Commission provide strong evidence that the motivating factors in Donn Atanasoff's decision to discharge Johnson and Koski were their roles in the meeting of July 20 and the drafting of the drivers' demands. Indeed, Jardanowski's admissions before the State's agency show that Donn's only motive was to punish Johnson and Koski for their Section 7 activity.

The Company's brief, ignoring the General Counsel's prima facie case, asserts that Donn Atanasoff decided to terminate Johnson and Koski because they were "the worst offenders'' among unnumbered and unidentified drivers, when it came to "manipulating mileage logs and over-marking claimed hours worked.'' The quoted language reflects Donn's testimony in these cases. This was only the last of a variety of reasons, however, Donn had presented to explain his decision to fire the two drivers.

Donn's testimony before me is not reflected either in the discharge letters of July 26, or in his letters of August 11, September 8, and 21 to the Michigan Employment Security Commission, which purported to reflect his reasons for discharging Johnson and Koski. The letters to Johnson and Koski gave, as one reason for their discharges, that they "deliberately and falsely logged excessive 'in-service hours' during week days in order to get weekends off.''

Nor was Donn's testimony consistent with the Company's letters to the commission, dated August 11, September 8, and 21. In the letter dated August 11, Donn, signing for the Company as "General Manager Attorney at Law,'' adopted the reasons given in the discharge letters of July 26. In the letter of September 8, Donn, signing as "Attorney for Krist Oil,'' changed the reasons, asserting that the Company terminated Johnson "for falsifying wage and/or logbook information, both in violation of Federal and Michigan Department of Transportation regulations.'' In his letter of September 21, Donn signing as "General Manager Attorney at Law,'' reduced their offense to "falsifying wage reports.''

On November 18, Jardanowski, the Company's witness before the Commission, abandoned the false logging reason, given in the discharge letters bearing his signature, and admitted that Donn saw the two employees as a threat because of the demand letter and because the drivers might quit or strike.

Donn Atanasoff's resort to shifting and inconsistent reasons for terminating Johnson and Koski cast doubt on the credibility of the explanation that the Company urges in its posthearing brief. Here, as in its attempt to explain Mains' and Creten's terminations, the Company came up with a new reason each time it was called on to excuse Johnson's and Koski's discharges. This circumstance added to the evidence of unlawful motivation.[16]

The Company's attempt to show when Donn Atanasoff made his decision to fire Johnson and Koski fatally injured the credibility of its defense. Review of the testimony of the Company's witnesses shows that its proffered business reason was a hasty expedient, designed to conceal Donn's unlawful motive. Jardanowski testified that in April, he recommended to Donn that he discharge Johnson and Koski for falsifying timecard and driving log entries and that he relied on such entries that were made in June and July. Clearly, Jardanowski was asserting, under oath, that he relied on information that did not exist at the time of his recommendation. In light of my earlier assessments of his reliability as a witness, Jardanowski's testimony that he compiled all of the false entries in April 1994, for use in these proceedings, did not add to my confidence in his testimony regarding his recommendations to Donn.

Donn Atanasoff, whose credibility I have discussed above in footnote 16, contributed to my disquiet on the following day of these proceedings, when he repudiated Jardanowski's testimony regarding the false entries and the date of the discharge recommendation. According to Atanasoff, Jardanowski "was confused as to his dates.'' Donn's testimony was that he instructed Jardanowski to review logbooks and timecards in a process that extended from April to June 1993, and in June Jardanowski was to tell him "who was doing what and what was taking place.'' Assuring me that he remembered, Atanasoff testifed that he made the decision to terminate Johnson and Koski in mid-June. Atanasoff's testimony did not include any assertions about what Jardanowski reported in June, however, or what records

[16] Before me, Donn Atanasoff denied that the list of demands that employee Johnson handed to Krist Atanasoff formed the the basis of Johnson's and Koski's termination. Donn then testified, in substance, that in his view, the employees' demands were nothing more than an effort to roll back the Company's new wage policy announced on July 14. Donn's denial contradicted Fleet Supervisor Jardanowski's admissions before the Michigan Employment Security Commission. In resolving this conflict, I have examined Donn's testimony and found it wanting in reliability. I have noted his use of different reasons at different times to explain the two discharges, his evasiveness on cross-examination and his denial that he had anything to do with Johnson's and Koski's unemployment benefits claims before the Michigan agency prior to November, when in fact he sent letters to the agency in August and September seeking to block their benefits. At another juncture in his testimony, Donn asserted that Jardanowski had participated in the decision to discharge Johnson and Koski. When pressed again, Donn admitted that he made the decision himself. In these two episodes, as in other instances during his testimony, Donn seemed to be improvising as he fenced with counsel for the General Counsel, instead of giving his best recollection. These flaws in Donn's testimony and demeanor caused me to reject his testimony when it conflicted with Jardanowski's admissions before the Michigan Employment Security Commission.

Donn relied on when he made his decision to terminate "the two worst offenders.''

Donn's characterization of Johnson and Koski as "the two worst offenders'' was a new twist in the Company's explanation. In the letters announcing the reasons for Donn's decision to discharge Johnson and Koski, their misconduct was that they "deliberately and falsely logged excessive 'in-service' hours during week days in order to get weekends off.'' Review of Donn's letters to the Michigan Employment Security Commission dated August 11, and September 8 and 21, respectively, did not say anything about Johnson being one of "the two worst offenders'' in the falsifying of wage or logbook entries. His own testimony on April 20, 1994, confirmed that fact. Thus, it appeared that on May 17, 1994, Donn was inventing a new excuse for his decision to fire the two employees, who had complained about the Company's new wage policy, participated in the drivers' meeting, and in the drafting of the demands for improved wages and conditions of employment, which Johnson presented to Krist Atanasoff. This aspect of Donn's testimony cast serious doubt on the reliability of his claim that he made this decision on June 15 after receiving reports from Jardanowski.

Indeed, neither Donn nor Jardanowski pointed out what it was in the Company's records that showed that Johnson and Koski were the "worst offenders.'' What facts convinced Donn that he was firing the worst offenders? Who were the other offenders and how extensive was their falsification? Donn, who made the decision to fire Johnson and Koski did not provide any light in this regard. Donn's failure to disclose the basis for his view that Johnson and Koski were "the worst offenders'' provided the final blow to his credibility in this regard.

I find that the Company has not shown by credible evidence that Donn Atanasoff made his decision on June 15 on information provided to him by Fleet Supervisor Jardanowski. In sum, the Company has not substantiated its defense that business reasons motivated Donn's decision to discharge Johnson and Koski. Instead, I find that the Company's proffered explanation was pretextual.

Further, I find the Company has failed to rebut the General Counsel's prima facie showing that it discharged employees Johnson and Koski because they engaged in concerted activity protected by Section 7 of the Act. By discharging these employees, I find that the Company violated Section 8(a)(1) of the Act.

The General Counsel also alleged, and the Company denied, that it discharged Johnson and Koski in violation of Section 8(a)(4) of the Act. The General Counsel has not made the necessary prima facie showing required by that section of the Act. Johnson filed his charges after his and Koski's discharges. There is no showing that Koski filed a charge against the Company. I shall recommend dismissal of this allegation.

I further find that Jardanowski, acting on the Company's behalf, used the pretext of timecard fraud to impair Johnson's opportunity for employment at U.P. Special Delivery, Inc. in January 1994. Jardanowski thus blackballed Johnson because he attended the drivers' meeting on July 20, and because Johnson helped in drawing up the drivers' demands for improved wages and conditions of employment and presented them to the Company. By Jardanowski's action in this regard, the Company violated Section 8(a)(1) of the Act.

I also find that the Company's offers of reinstatement to Johnson and Koski were not made in good faith. In making this finding, I have considered the Company's unlawful conduct toward Mains, after she accepted a similar offer. I have also borne in mind the Company's persistence in violating the Act in the spring of 1994, as found below, when it discriminated against employee Donald Maglio because he testified in these proceedings, and again when it imposed unlawful restrictions on its employees' exercise of rights protected by Section 7 of the Act.

Here, as in the case of Mains and Creten, the Company discharged the two Iron River drivers because they had participated in a meeting with other employees and had joined with them in pressing the Company for improved wages and conditions of employment. Further, Johnson emulated Mains by filing unfair labor practice charges against the Company. The first was in December, alleging that the Company terminated him in violation of Section 8(a)(1) of the Act. On March 24, 1994, Johnson filed a second charge in Case 30–CA–12476, alleging that the Company had blackballed him in violation of Section 8(a)(1) of the Act. In light of the Company's continuing disregard of the Act and its harsh treatment of Mains, I find it likely that Johnson and Koski would have encountered equally harsh treatment had they accepted the Company's offers of reinstatement. Thus, it was not necessary for them to respond to the Company's offers. See *Woodline Motor Freight*, 278 NLRB 1141, 1143 (1986), enfd. in pertinent part 843 F.2d 285, 291 (8th Cir. 1988).

C. Donald Maglio

1. The facts

On April 19, 1994, Company Transport Driver Donald Maglio testified before me in these proceedings. An 8-year employee, Maglio testified on behalf of the General Counsel, recounting how the Company's announcement of its new wage policy, effective July 1 of the previous year, had impacted on him and the other drivers. He testified that he believed that the new policy would deprive the drivers of "quite a bit of our pay.'' Maglio went on to testify about the drivers' meeting; where it was, who was there, and the demands that he and the other participants drew up. He testified that Koski had reported Krist's blackballing threat to the drivers at the meeting. Maglio also identified the written list of demands that Richard Johnson presented to Krist Atanasoff. I find from Maglio's testimony that he prepared the list of demands from the notes someone took at the meeting.

Maglio testified about another meeting of the Company's drivers. This occurred after the Company fired Johnson and Koski. Maglio testified that the purpose of the meeting was to determine what if anything the drivers should do about the firings. The drivers decided to do nothing.

According to Maglio's testimony, shortly after the Company discharged Johnson and Koski, Fleet Supervisor Jardanowski instructed Maglio to keep his logged hours down a little. Maglio testified that he told Jardanowski that he would not do it as it would be illegal.

Almost 4 months before he testified in these proceedings, the Company had disallowed Maglio's claim for extra pay for changing a diesel pump nozzle, without disciplining him. Yet the new company policy specifically barred such work from extra pay. Smetak admitted that he did not discipline Maglio for that claim.

On April 21, 1994, Jardanowski directed Maglio to appear in Jardanowski's office. Jardanowski showed the Company's new

wage policy announcement dated July 14 to Maglio and asked him if he understood it. Maglio said he did.

On the following day, when Maglio arrived at the Company's Iron River terminal, he received a note from Jardanowski directing him to see Richard Smetak. Smetak delivered a written reprimand to Maglio for claiming 1 hour for delivering a split load. The reprimand also warned that Maglio could be discharged if he failed to comply with company rules and regulations.

On Monday, April 25, 1994, the Company notified Maglio that it intended to remove the reprimand from his record. On the following day, Maglio went to the Company's office and learned from Smetak that the Company was rescinding his reprimand. On the same day, Smetak and Maglio signed a company form on which Smetak declared that the hour had not been paid and "therefore is not a matter of concern.'' The same form announced that the warning of April 21, 1994, had been removed from Maglio's personnel record.

Smetak's testimony suggests that he issued the reprimand first and then investigated Maglio's claim for 1 hour's pay for delivering one load to two destinations. On direct examination, Smetak admitted that he inferred that the Company had paid Maglio for the 1 hour, from a timecard entry and hearsay.

Prior to April 21, 1994, Smetak did not talk to Maglio about his claim for 1 hour's pay for a split load.[17] The timecard entry did not include any indication of payment. At the time he signed the reprimand, in Smetak's presence, Maglio asserted that he was not sure that he had been paid for the hour. Maglio also said that if he had been paid for the hour, he would return the money.

Smetak admitted that prior to Maglio's warning, he had not warned any company driver. When asked why he had singled Maglio out, he answered, "Because of my investigation in the time card.'' Yet Smetak went on to admit that he had investigated the timecards of numerous other drivers, had found errors, and had warned none of them.

2. Analysis and conclusions

The General Counsel contends that the Company violated Section 8(a)(4) and (1) of the Act by harassing Maglio. The Company points to its retraction of the warning issued to Maglio and his testimony showing that this corrective action has calmed his animosity and contends that it did not harass him. Guided by *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I find that the General Counsel has shown that the warning that the Company issued to Maglio on April 21, 1994, was a reprisal for his his testimony before me.

Section 8(a)(4) of the Act makes it an unfair labor practice for an employer to take adverse action against an employee for giving testimony before the Board. See *NLRB v. Scrivner*, 405 U.S. 117, 124–125 (1972). Here, I find much to suggest that the Company issued a reprimand to Maglio because of his testimony before me on behalf of the General Counsel. The reprimand came but 2 days after Maglio had testified in support of the General Counsel's contention that the Company had unlawfully discharged Johnson and Koski. In that same testimony, Maglio disclosed his participation in the employees meeting and in the preparation of their demand letter. He also revealed that he put the letter in its final form. Thus Maglio showed that he had been a leading figure in the Section 7 activity that had provoked the Company to discharge employees Johnson and Koski.

Smetak's haste in issuing the reprimand suggests that the Company was anxious to show its hostility toward Maglio. Smetak, the author of the reprimand, composed it so swiftly that he issued it without investigating Maglio's thinking about why he was entitled to the hour's pay. Nor did Smetak make any effort prior to issuing the letter of reprimand and the warning to find out if Maglio had been paid for the 1 hour. Further, Smetak admittedly singled Maglio out for discipline, notwithstanding that other drivers made errors on their timecards. The Company's willingness to use its economic power to punish employee for exercising their Section 7 rights, suggests the likelihood that it would do likewise to those assisting the vindication of those rights. In sum, I find that the General Counsel has made a prima facie showing that Maglio's statutorily protected activity in 1993 and his participation in these proceedings as a witness for the General Counsel were motivating factors in Smetak's decision to discipline Maglio on April 21, 1994.[18]

If Smetak had investigated Maglio''s claim for 1-hour pay for a split load he might have withheld the reprimand. For, as Smetak found out, after disciplining Maglio, "the hour was not paid, and therefore is not a matter of concern.'' Also, if he had looked into the matter, Smetak might have reexamined the Company's announcement of a new wage policy, dated July 14, and seen that it did not say anything about not allowing an hour for a split load. Perhaps Maglio would have shown Smetak a memo from President Krist Atanasoff to the Company's drivers, dated May 23, 1990, which announced that from that date on, "You will be paid for a split load.'' Instead, Smetak hastily reached out for the chance to punish Maglio. This haste and the failure to investigate cast doubt on Smetak's testimony in which he tried to show an economic reason for punishing Maglio. Indeed, these two factors add to the evidence of unlawful motives.

The record shows that almost 4 months before he testified in these proceedings the Company had disallowed Maglio's claim for extra pay for changing a diesel pump nozzle without disciplining him. Yet the new company policy specifically barred such work from extra pay. Smetak admitted that he did not discipline Maglio for that claim. The Company offered no explanation for the disparity between the two incidents. The General Counsel's prima facie case provided an explanation showing unlawful motives.

I find that the Company has failed to rebut the General Counsel's strong showing that Smetak seized on a pretext to punish Maglio because he had participated in the drivers' meet-

[17] On cross-examination, Smetak insisted that he had questioned Maglio before issuing the warning. In his effort to show that he had investigated before disciplining Maglio, Smetak first testified that the document issued to Maglio on April 21, 1994, was "a conference.'' When pressed by counsel for the General Counsel he finally conceded that it was a disciplinary action.

[18] The General Counsel did not contend that Maglio's participation in the drivers' meeting and in the preparation of their demands was a second motive for disciplining Maglio on April 21, 1994. The contents of Maglio's testimony have been fully litigated, however, and the Company has been put on notice by the consolidated complaint that the legality of its disciplinary action against Maglio was under scrutiny. Accordingly, I have considered whether the Company had two motives when it disciplined Maglio on April 21, 1994. *Sawyer of Napa, Inc*., 300 NLRB 131, 137 fn. 16 (1990).

ing, had prepared their demand letter, and had testified at the Board hearing in these cases. Accordingly, I further find that by Smetak's issuance of a reprimand and a warning to Maglio on April 21, 1994, the Company violated Section 8(a)(1) and (4) of the Act.

I also find that the Company's new wage policy did not countermand Krist Atanasoff's memorandum of May, 23, 1990, which declared that from that date on the Company would pay drivers for split loads. By withholding 1 hour's pay from Maglio for delivering a split load on April 7, 1994, I find the Company further violated Section 8(a)(1) and (4) of the Act.

The Company's retraction of the warning on April 26, 1994, did not remedy these unfair labor practices. The retraction did not include the unlawful reprimand. Nor did the Company notify its drivers that it had retracted the warning issued to Maglio, In short, these unfair labor practices remain unremedied.

D. The New Rules

On May 12, 1994, Escanaba Store Manager Denise O'Donnell asked Yvonne Mains to read over a new three-page checklist entitled, "Krist Oil Company Employee Conduct Check List,'' initial each item on the list, and then sign the last page, witnessd by O'Donnell. The checklist included the following rules:

> 34. Solicitation of employees by other employees, and/or the distribution of of literature between employees is prohibited during all work time. Work time means any time when the person soliciting or being solicited is or should be working.
>
> 35. Distribution of literature, pamphlets and other materials between employees is prohibited in work areas at all times. Work area includes any and all places where employees regularly work, confer or conduct business.
>
> 40. Creating or repeating any false, defamatory or derogatory statements concerning a co-employee, superior, vendor or any person. This policy is not limited to the Krist Oil premises, property or persons.

On or about May 9, 1994, the Company promulgated a handbill entitled "Krist Oil Company No Solicitation Policy'' to its Escanaba store employees. The handbill incorporated the contents of rules 34 and 35, above. In addition, the handbill restricted solicitation and distribution by nonemployees on the Company's premises and unauthorized sales and solicitations of orders for any type of product or service to anyone on the Company's premises.

On May 14, 1994, at Iron River, the Company held a meeting of its drivers, at which it announced a new set of rules and regulations for them. Included in this new dispensation, were rules similar to those quoted above and to the rules included in the handbill that the Company promulgated at the Escanaba store earlier in the month. In addition, the new rules and regulations for the Company's drivers included the following:

> 7. Drivers are strictly prohibited from using their C.B. Radio except to discuss specific driving responsibilities, which require communication with other drivers. All other use is strictly prohibited.

One of the drivers asked President Krist Atanasoff for clarification of rule 7, Krist explained that the drivers could talk about fishing, hunting, or say hello to their colleagues, but could not discuss anything pertaining to the Company, how it treated the drivers, what goes on in the Company, or anything else about the Company. Krist also said that if the drivers had any gripes or complaints, they were to take them up with the Company and the Company would take care of them.

The Board has recognized that otherwise valid no-solicitation and no-distribution rules violate the Act when they are promulgated to interfere with employee rights protected by Section 7 of the Act, rather than to maintain production and discipline. *Harry M. Stevens Services*, 277 NLRB 276 (1985). Here, the General Counsel alleged that in May 1994 the Company unlawfully promulgated the rules quoted above. The promulgation of these new rules followed in the wake of the Company's unlawful efforts to punish five employees for exercising rights protected by Section 7 of the Act. Also, they came soon after Maglio had testified before me criticizing the Company's wage policy. Had they been in effect in the the spring and summer of 1993, these rules would have squelched any thought by Mains, Creten, Johnson, Koski, and Maglio of enlisting other employees in the work of drafting, discussing, and finally preparing lists of demands for improved wages and working conditions. Also, rule 40 might have discouraged Maglio from testifying about his supervisor, company management, and the company wage policy on behalf of the General Counsel in these proceedings. Further, the Company has not shown that it promulgated these rules to maintain its business operations properly and its employees' discipline. Accordingly, I find that Company's no-solicitation and no-distribution rules, its rule against false, defamatory, or derogatory statements, and its restrictions on the use of CB radios, all of which it promulgated in May 1994, were designed to restrain, coerce, and interfere with its employees' enjoyment of their rights under Section 7 of the Act and therefore violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By discharging Yvonne Mains, Jodi Cretan, Richard Johnson, and Brian Koski, threatening to blackball Richard Johnson, attempting to blackball Richard Johnson, by promulgating no-solicitation and no-distribution rules, by restricting employees' speech on and off its premises regarding wages, hours, and conditions of employment, and by restricting it employees' use of CB radios in its trucks, to prevent them from engaging in concerted activity protected by Section 7 of the Act, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Company violated Section 8(a)(1) and (4) of the Act by:

> (a) Reinstating Yvonne Mains as a trainee, under Denise O'Donnell's surveillance, imposing onerous tasks on Mains, and denying her employment and 1 day's pay.
>
> (b) Harassing Donald Maglio by disciplining him.
>
> (c) Refusing to pay Donald Maglio 1 hour's pay for delivering a split load on April 7, 1994.
>
> (d) Attempting to blackball Richard Johnson.

3. The Company did not violate Section 8(a)4 of the Act by discharging employees Mains, Creten, Johnson, and Koski.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company having unlawfully discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net iterim earnings as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Company, having unlawfully deprived Yvonne Mains of 1 day's pay and Donald Maglio, of 1 hour's pay, must make them whole for their losses of pay, plus interest as computed in *New Horizons for the Retarded*, above.

The Company having given U. P. Special Delivery, a false derogatory job reference regarding Richard Johnson, I shall recommend that the Company be required to disavow and withdraw that reference in a letter to that employer in writing, and to notify Johnson that it has done so.

I shall also recommend that the Company be required to remove from its files any references to the unlawful disciplinary action against Maglio and the unlawful discharges of employees Mains, Creten, Johnson, and Koski and notify these employees that it has done so and that it will not use these adverse actions against them in any way.

Because the Company has a proclivity for violating the Act and has, by its egregious unfair labor practices, demonstrated a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Company to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]